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THE
**INSURANCE
LAW JOURNAL.**

**REPORTS OF ALL DECISIONS
RENDERED IN INSURANCE CASES IN THE FEDERAL COURTS
AND IN THE STATE SUPREME COURTS.**

**WALTER S. NICHOLS,
WILLIAM OTIS BADGER, JR., } Editors.**

VOLUME XLIII.

NEW SERIES, VOLUME XXIII.

**NEW YORK:
PUBLISHED BY C. C. HINE'S SONS COMPANY,
100 WILLIAM STREET.**

1914.

THE

INSURANCE LAW JOURNAL.

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REPORTS OF ALL DECISIONS

RENDERED IN INSURANCE CASES IN THE FEDERAL
COURTS, AND IN THE STATE SUPREME COURTS.

From certified transcripts in our possession.

LIFE.

UNITED STATES SUPREME COURT.

No. 56.—OCTOBER TERM, 1913.

NEW YORK LIFE INSURANCE COMPANY, *Plaintiff in Error,*

v.s.

DEER LODGE COUNTY.*

INSURANCE—INSURANCE AND COMMERCE.

Issuing a policy of insurance is not a transaction of commerce.

INSURANCE—CORPORATIONS—RIGHT TO TRANSACT BUSINESS.

The right of a foreign corporation to do business in a state other than that of its creation depends wholly upon the will of such other state.

COMMERCE—INSURANCE CONTRACT.

The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such contract is a mere incident of commercial intercourse.

(For other cases, see Commerce, Cent. Dig. § 33; Dec. Dig. § 45.)

(For other definitions, see Words and Phrases, vol. 2, pp. 1287-1298; vol. 8, pp. 7606, 7607.)

In Error to the Supreme Court of the State of Montana.

MCKENNA, J., delivered the opinion of the Court.
Plaintiff in error, called herein plaintiff, as it was such in the

* Decision rendered, Dec. 15, 1913. From certified transcript.

courts below, brought suit against the defendant in error, herein called defendant, to recover the sum of \$209.79, with interest, the amount of taxes paid by plaintiff under protest to defendant.

The tax was levied under a law of the state requiring every insurance corporation or company transacting business in the state to be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the state during the year previous to the year of listing in the county where the agent conducts the business, properly proportioned by the corporation or company at the same rate that all other personal property is taxed. It is provided that the agent shall render the list, and if he refuses, or to make affidavit that the same is correct to the best of his knowledge and belief, the amount may be assessed to the best knowledge and discretion of the assessor. The corporation and companies are subject to no other tax under the laws of the state except on real estate, and the fees imposed by law.

It was alleged in the complaint that the "tax was and is illegal, unlawful and void for that said defendant was without jurisdiction to levy or collect said tax, and the levy and collection thereof was and is a burden upon interstate commerce, contrary to Section 8 of Article I. of the Constitution of the United States."

A summary of the allegations of the complaint, which is very long, is as follows:—

The plaintiff is a New York corporation, with its home office in New York City, and has transacted and does transact the business of life insurance on a large scale in all of the states of the United States, and with persons residing in every country of the civilized world. It commenced to transact its business with residents of Montana in 1869, and its business has progressively increased until its total insurance in force in that state amounts to \$10,023,445, calling for premiums amounting to \$343,664.93. This total insurance is made up of policies averaging \$2,000 each, and these are subject to sale, assignment and transfer and are used for collateral security and other commercial purposes, and are valuable for such purpose and for other general purposes of trade and commerce.

The company transacts its business through agents, who solicit insurance, collect the first premium and deliver the policy, which is prepared and transmitted from the home office to him for such purpose. The company also employs an agency director by contract in writing directly with the home office through the mails, who supervises the work of soliciting agents and recommends those who desire to become such. The company also employs medical examiners, with specified duties, their employment being negotiated through the mails, and their reports are made through the mails, and if further information is desired, the home office obtains it by correspondence through the mails. It has also a confidential employee called an inspector,

whose employment is intended to be secret and who transmits information through the mails. In Butte, in the state of Montana, the company maintains a cashier, appointed from the home office, whose authority, however, is limited to making and supervising such records as the business of the office requires, receiving from the soliciting agents and medical examiners applications for new insurance solely for transmission to the home office, receiving the reports of the home office of its action on such applications, and receiving policies, and the premiums which are paid on the new policies and not transmitted directly to the home office, mailing premium notices made out at the home office, and sent to him for that purpose; receiving renewal premiums when specially authorized; depositing the amount thereof in bank at Butte to the credit of the company and to be drawn upon by it and not by him; keeping account of the insurance obtained by the soliciting agents and settling with such agents the commission. The company has never had any office or place of business except said office at Butte and one other at Helena, with like duties and authority.

Forms for the use of the several transactions are prepared at the home office and transmitted by mail to the company's employees. No agent is authorized to accept risks of any kind or make or modify contracts, nor have they ever done so. The officers of the company reside and have always resided in and near the city of New York and had and have their offices and places of business at the home office. All risks are accepted and contracts made, modified and discharged at the home office.

The manner of taking applications for insurance and the final issue of policies is alleged, which shows that the ultimate judgment of their character and acceptance is reserved for the home office. The manner of paying premiums is alleged to be either directly to the home office through the mails, or to the cashier of the company at its office in Butte, and that the several policies provide for advances and that the company has outstanding advances or loans to its policyholders in the state aggregating the sum of \$432,878. The loan is made by transmitting an application to the home office, where it is considered and acted upon, and, if accepted, a loan agreement is transmitted to the applicant, who, after executing it, returns it to the home office and the proceeds of the loan forwarded by mail to the policyholder by the company's check on its bank account in New York. And the use of the mails is alleged in payment of premiums and proofs of death.

On account of this manner of doing business it is alleged on information and belief to be interstate commerce and within the meaning of the Commerce Clause of the Constitution of the United States.

The laws of the state by virtue of which the tax was imposed

are set out. They finally became section 4073 of the Revised Codes, 1907.

The company did not have any property within Deer Lodge County at any time during the year 1910. It paid without protesting the tax imposed by section 4017 of the Revised Codes for the year 1909, amounting to \$3,496.85. It also, during said year, paid to the state licenses and fees aggregating the sum of \$234. In 1909 it received from policyholders residing in the county, premiums aggregating the sum of \$14,233.41. Its losses and expenses amounted to the sum of \$8,888.41. The excess of premiums over losses for said year was the sum of \$5,345, upon which there was imposed the sum sued for. The company paid the tax under protest.

A demurrer was sustained to the complaint and a judgment entered dismissing the action. It was sustained by the Supreme Court of the state.

The same contention is made here as in the state courts, that is, that the tax is a burden on interstate commerce, and an elaborate argument is presented to distinguish this case from those in which this court has decided that insurance is not commerce. These cases are: Paul vs. Virginia, 8 Wall. 168 (1808); Ducat vs. Chicago, 10 Wall. 410; Liverpool Ins. Co. vs. Massachusetts, 10 Wall. 566; Philadelphia Fire Ass'n vs. New York, 119 U. S. 110; Hooper vs. California, 155 U. S. 648; Noble vs. Mitchell, 164 U. S. 367; New York Life Ins. Co. vs. Cravens, 178 U. S. 389; and Nutting vs. Massachusetts, 183 U. S. 553.

If we consider these cases numerically, the deliberation of their reasoning, and the time they cover, they constitute a formidable body of authority and strongly invoke the sanction of the rule of *stare decisis*. This we especially emphasize, for all of the cases concerned, as the case at bar does, the validity of state legislation, and under varying circumstances the same principle was applied in all of them. For over forty-five years they have been the legal justification for such legislation. To reverse the cases, therefore, would require us to promulgate a new rule of constitutional inhibition upon the states, and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision. In deference, however, to the earnestness of counsel, we will consider more particularly (1) what the cases decide, and (2) whether they are wrong in principle.

Paul vs. Virginia is the progenitor case. A law of Virginia precluded any insurance company not incorporated under the laws of the state doing business in the state without previously obtaining a license for that purpose, which could only be obtained by a deposit with the state treasury of bonds of a specified character to an amount varying from thirty to fifty thousand dollars. A subsequent law required the agent of a foreign insurance company to take out a license.

Paul was appointed the agent of several fire insurance companies incorporated in the state of New York. He applied for a license, offering to comply with all the provisions of the law excepting the deposit of bonds. The license was refused and he, notwithstanding, undertook to act as agent for the companies, offered to issue policies in their behalf and in one instance did issue a policy in their name to a citizen of Virginia. For this violation of the statute he was indicted and convicted in one of the state courts and the judgment was affirmed by the Supreme Court of Appeals of the state. Error was prosecuted from this court based on, as one of its grounds, the alleged violation of the Commerce Clause of the Constitution of the United States.

Replying to the argument to sustain the contention, the court said, by Mr. Justice Field, that its defect lay in the character of the business done. "Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having existence and value independently of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York, whilst in Virginia, would constitute a portion of such commerce."

The doctrine announced, that insurance was not commerce but a personal contract, was emphasized by illustrations. *Nathan vs. Louisiana*, 8 How. 73, was cited, where a tax on money and exchange brokers who dealt in the purchase and sale of foreign bills of exchange was sustained as not conflicting with the constitutional power of Congress to regulate commerce. The individual thus using his money, it was said (quoting the cited case), "is not engaged in commerce but in supplying an instrument of commerce. He is less connected with it than a ship builder, without whose labor foreign commerce could not be carried on." The doctrine was further illustrated by bills of exchange foreign and domestic, which it was said were subject to the regulating and taxing laws of the states. And it was

pointed out that the Federal Government taxed not only foreign bills but domestic bills and promissory notes, whether issued by individuals or banks, a power the Government could not have, it was said, if bills and notes were commerce. It was finally said: "If foreign bills may thus be the subject of state regulation, much more so may contracts of insurance against loss by fire."

We have taken the trouble to make this long excerpt from the opinion because, as we have said, the case is the primary one, and because its argument is really exhaustive of the general principle. We shall consider presently whether there is anything in the case at bar which takes it out of the principle.

In *Ducat vs. Chicago*, a law of Illinois came up for review. It was a regulation of insurance companies not incorporated by the state, and required their agents to be licensed upon the performance of certain conditions. Subsequently by the act incorporating Chicago the Legislature imposed on all foreign insurance a tax of \$2 upon the \$100 and at that rate upon the amount of all premiums which should be received. It was made unlawful for any company to transact business until the payment was made. The State Supreme Court sustained the tax and this court affirmed its action, resting the decision on *Paul vs. Virginia*, the reasoning of which, it was said, it was not necessary to repeat.

Liverpool Ins. Co. vs. Massachusetts: The subject came up again for consideration in passing upon a statute of Massachusetts which levied a tax upon all premiums charged or received by any fire, marine and fire and marine insurance company not incorporated under the laws of the state. The law was sustained. It was said: "The case of *Paul vs. Virginia* decided that the business of insurance, as ordinarily conducted, was not commerce, and that a corporation of one state, having an agency by which it conducted that business in another state, was not engaged in commerce between the states."

Philadelphia Fire Ass'n vs. New York: A statute of New York imposing taxes and conditions upon insurance companies of other states was considered and sustained. *Paul vs. Virginia* was cited for the view that "issuing a policy of insurance is not a transaction of commerce."

We may say here that *Paul vs. Virginia* was also cited for the proposition that the right of a foreign corporation to do business in a state other than that of its creation depends wholly upon the will of such other state. This proposition, it was said, was sustained by previous cases, and it has been sustained by many subsequent cases. Necessarily it could not be applied to foreign insurance companies if the business of insurance is commerce. In other words, that right exists and has only an exception, as was said in *Hooper vs. California*, 155 U. S. 648, "where a corporation created by one state rests its right to en-

ter another and to engage in business therein upon the Federal nature of its business." And that was the contention in *Hooper vs. California*, asserting the invalidity of the statute of the state making it a misdemeanor for any person in that state to procure insurance for a resident in the state from an insurance company not incorporated under its laws. The argument was that inasmuch as the contract involved was one for marine insurance, it was a matter of interstate commerce, and as such beyond the reach of state authority and included among the exceptions to the rule. It was replied by the court: "This proposition involves an erroneous conception of what constitutes interstate commerce. That the business of insurance does not generically pertain to such commerce has been settled since the case of *Paul vs. Virginia*." To the attempt to distinguish between policies of marine insurance and policies of fire insurance, and thus take the former out of the rule of *Paul vs. Virginia*, it was answered, "It ignores the real distinction upon which the general rule and its exceptions are based, and which consists in the difference between interstate commerce or an instrumentality thereof on the one side and the mere incident which may attend the carrying on of such commerce on the other." And it was pointed out that if the power to regulate interstate commerce applied to all of the incidents of such commerce and "to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states; and would exclude state control over many contracts purely domestic in their nature." And then, sweeping away the distinction between the different subject-matters of insurance contracts, and the different events indemnified against, and declaring the principle applicable to all and determinative of the regulating power of the states over all, it was said, "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'"

This declaration was repeated and applied in *Noble vs. Mitchell*, 164 U. S. 368, and in *New York Life Insurance Co. vs. Cravens*, 178 U. S. 389. The latter case has special application, for the plaintiff in error here was the plaintiff in error there and the case concerned life insurance companies and their policies. In that case it was contended that a policy of mutual life insurance was an interstate contract and the parties might choose its "applicable law." The contention was made in many ways and with great amplitude of argument and illustration. It was urged that on account of the mutual character of the company it was the administrator of a fund collected from its policyhold-

ers in different states and countries for their benefit. And the extent of the business was displayed by a stipulation of the parties as follows: "That during the year 1886 and prior to the issuance of the policy sued upon, the amount of policies issued by defendant to citizens of Missouri was \$1,617,985, and the amount of insurance in force on the lives of citizens of Missouri on December 31, 1886, was \$8,886,542, and the total amount of policies issued by defendant in said year 1886 was \$85,178,294, and the total amount of policies in force on December 31, 1886, issued by defendant was \$304,373,540."

It was also urged that modern life insurance had taken on essentially a national and international character, and that when *Paul vs. Virginia* was decided the business was "to a great extent local, that is, conducted through the domestic contracts by stock companies. The great and commanding organizations of the present day had hardly begun the amazing developments which have made them the greatest associations of administrative trusts of the business world."

These contentions were earnestly made; the reply to them deliberately meditated and its extent fully appreciated. The ruling in *Paul vs. Virginia* and other cases was applied. We omitted the reasoning by which they demonstrated, we said, the correctness of their conclusion. We, however, repeated that "the business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea,'" and, we added, "that against the uncertainty of man's mortality."

In *Nutting vs. Massachusetts* a statute of the state was sustained which required a licensing of the agent of a foreign insurance company not admitted to do business in the state and made it a crime to solicit insurance of a resident in violation of the statute. The principle of the prior cases which we have referred to was affirmed.

This detail shows what the cases decided. Were they rightly decided? The reasoning of the cases anticipate and answer the question, and it would rack ingenuity to attempt to vary its expression or more aptly illustrate it. A policy of insurance, the cases declare, is a personal contract, a mere indemnity, for a consideration, against the happening of some contingent event, which may bring detriment to life or property, and its character is the same no matter what the event insured against, whether fire or hurricane, acts of man or acts of God, storms on land or storms on sea, death or lesser accident. The same event may involve both life and property, precipitating the obligation of the policies. Nor does the character of the contracts change by their numbers or the residence of the parties. The latter is made

much of in this case. It was made much of in the Cravens case. The effort has been to give a special locality to the contracts and determine their applicatory law, and, indeed, to a centralization of control, to employ local agents but to limit their power and judgment. To accomplish the purpose there is necessarily a great and frequent use of the mails, and this is elaborately dwelt on by the insurance company in its pleading and argument, it being contended that this and the transmission of premiums and the amounts of the policies constitute a 'current of commerce among the states.' This use of the mails is necessary, it may be, to the centralization of the control and supervision of the details of the business; it is not essential to its character. And we may say, in passing, that such effort has led to regulating legislation, but that it cannot determine its validity, was decided in the Cravens case. See also Equitable Life Society vs. Clements, 140 U. S. 226.

This legislation is in effect attacked by the contention of the insurance company. We have already pointed out that if insurance is commerce and becomes interstate commerce whenever it is between citizens of different states, then all control over it is taken from the states and the legislative regulations which this court has heretofore sustained must be declared invalid.

The number of transactions do not give the business any other character than magnitude. If it did, the department store which deals with every article which covers or adorns the human body, or, it may be, nourishes it, would have one character while its neighbor, humble in the variety and extent of its stock, would have another. Nor, again, does the use of the mails determine anything. Certainly not that which takes place before and after the transaction between the plaintiff and its agents in secret or in regulation of their relations. But put agents to one side and suppose the insurance company and the applicant negotiating or consummating a contract. That they may live in different states and hence use the mails for their communications does not give character to what they do; cannot make a personal contract the transportation of commodities from one state to another to paraphrase Paul vs. Virginia. Such might be incidents of a sale of real estate (certainly nothing can be more immobile). Its transfer may be negotiated through the mails and completed by the transmission of the consideration and the instrument of transfer also through the mails.

It is contended that the policies are subject to sale and transfer, may be used for collateral security and other commercial purposes. This may be, but this use of them is after their creation, a use by the insured, not by the insurer. The quality that is thus ascribed to them may be ascribed to any instrument evidencing a valuable right. The argument as anticipated in Paul vs. Virginia, citing Nathan vs. Louisiana, where, as we have seen, a

tax on money and exchange brokers who dealt in the purchase and sale of foreign bills of exchange was sustained as not conflicting with the constitutional power of Congress to regulate commerce among the states or with foreign nations.

It is contended that *Paul vs. Virginia* and the cases which follow it must be limited, as it is contended "the facts therein did limit them, to intrastate, not interstate, contracts," and that if they be not so limited the *Lottery case*, 188 U. S. 321, and *International Text Book Co. vs. Pigg*, 217 U. S. 91, cannot stand.

The basis of this contention necessarily is the insistence that the contracts in *Paul vs. Virginia* and the succeeding cases were intrastate contract while the contracts in the case at bar are interstate contracts. But this is a false characterization of the contracts. The decision of the cases is that contracts of insurance are not commerce at all, neither state nor interstate. This is the obstacle to the contention of the insurance company. The company realizes it to be an obstacle and has attempted to remove it by detailing the manner of conducting its business as demonstrating that its policies are interstate contracts. We have replied to the attempt and shown that its manner of business has no such effect. It follows necessarily, therefore, that neither the *Lottery case* nor the *Pigg case* impugns the authority or the application of the cited cases. They, the *Lottery case* and the *Pigg case*, were concerned with transactions which involved the transportation of property and were not mere personal contracts.

There are cognate cases to the cited cases, of contracts incident to commerce but not of themselves commerce. In *Williams vs. Fears*, 179 U. S. 270, there was levied by the state of Georgia a tax upon each emigrant agent or employer or employee of such agent, doing business in the state. The law imposing the tax was attacked as a violation of the Commerce Clause of the Constitution of the United States. Commerce was defined, quoting Mr. Justice Field, in *Mobile County vs. Kimball*, 102 U. S. 691, 702, to "consist in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities." The court considered the definition comprehensive enough for the purpose of the case and testing its application, said, by Mr. Chief Justice Fuller: "These agents were engaged in hiring laborers in Georgia, to be employed beyond the limits of the state. Of course, transportation must eventually take place as the result of such contracts, but it does not follow that the emigrant agent was engaged in transportation." The conclusion was supported by cases, among others, *Paul vs. Virginia* and *Hooper vs. California*. On the authority of the same cases and *Life Insurance Co. vs. Cravens*, in *Ware & Leland vs. Mobile County*, 209 U. S. 405, it was held that contracts by brokers for the sale of cotton for future delivery, where the

transactions were closed by contracts completed and executed in one state although the orders were received from another state, were legally subject to a tax. Such contracts, it was said, were not "the subjects of interstate commerce, any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company."

In *Engel vs. O'Malley*, 219 U. S. 128, a law of New York forbade individuals or partnerships to engage in the business of receiving deposits of money for safe keeping or for the purpose of transmission to another, or for any other purpose, without a license from the Comptroller. It was attacked as a violation of the Commerce Clause of the Constitution. The case was decided to be similar in principle to *Ware & Leland vs. Mobile County and Williams vs. Fears*, and the law was sustained.

Further discussion, we think, is unnecessary, and we have gone beyond the citing of the authoritative cases only in deference to the able and earnest argument of counsel. Judgment affirmed.

Hughes and Van Devanter, JJ., dissent.

True copy. Test: Clerk Supreme Court, U. S.



**SUPREME COURT OF NEW YORK.
APPELLATE DIVISION, FIRST DEPARTMENT.**

SAUERBRUNN

vs.

HARTFORD LIFE INS. CO.*

1. INSURANCE—MUTUAL LIFE INSURANCE—ASSESSMENTS—MODIFICATION.

Where a contract of insurance provides for death assessments upon surviving members according to an annexed table of graduated assessment rates based on the age of members, and the table terminates at the age of 60 years, with a maximum rate of \$2.68, the company cannot increase the rate on the prior contract to a rate above \$2.68 after 60 years.

(For other cases, see *Insurance*, Cent. Dig. §§ 430, 431; Dec. Dig. § 193.)

2. INSURANCE—FOREIGN COMPANY—JURISDICTION OF ACTION.

A court of this state has jurisdiction to order an accounting against a foreign insurance company, and to determine therefrom, in an action

* Decision rendered, November 14, 1913. 143 N. Y. Supp. 1009.

against it by a member, whether he has been and is being charged excessive rates on his insurance certificate, and thereupon to render judgment for any excess collected and enjoin such future collections.
(For other cases, see Insurance, Cent. Dig. § 33; Dec. Dig. § 26.)

**3. INSURANCE—FOREIGN COMPANIES—RIGHT TO REGULATE
—ACTIONS—DEMURRER—GROUNDS.**

In an action against a foreign insurance company to enjoin it from fixing and collecting alleged illegal rates, and asking an accounting, the question whether the court will attempt to regulate the internal affairs of a foreign company may not be raised by demurrer.

(For other cases, see Insurance, Cent. Dig. § 33; Dec. Dig. § 26.)

Appeal from Special Term, New York County.

Action by Henry Sauerbrunn, Jr., against the Hartford Life Insurance Company. From an interlocutory judgment overruling its demurrer to the complaint, defendant appeals. Affirmed, with leave to withdraw demurrer and answer.

Argued before Ingraham, P. J., and Laughlin, Scott, Dowling, and Hotchkiss, JJ.

John T. McGovern, of Providence, R. I., for Appellant.
Hooker I. Coggeshall, of New York City, for Respondent.

SCOTT, J.

The action is brought upon several identical insurance contracts issued by defendant, an assessment company. Defendant is a Connecticut corporation. It is not alleged that plaintiff is at present a resident of this state; that defendant transacts any business in this state, or has any property therein. The contracts sued upon were made in 1881, within this state, whereof plaintiff was then a resident. They provide for the payment of an assessment upon the living contract holders whenever a death occurs, and a table is annexed to the contract showing the maximum rates of assessment to be levied, graduated according to the age of the person assured. According to this table a contract holder who has attained the age of sixty years is assurable at the rate of \$2.68 per \$1,000, and no greater rate of assessment is specified after the age of sixty years. The plaintiff claims, and with reason, that \$2.68 per \$1,000 per death is the most that he can legally be charged, since, as he says, he became sixty years of age on January 15, 1900. Notwithstanding he has been assessed, as he says, since he became sixty years of age at a rate much larger than \$2.68, which he has paid in ignorance of his legal rights. The relief demanded is: (1) An injunction to prevent further excessive and illegal assessments; (2) an accounting to ascertain the amount unlawfully assessed upon and collected from plaintiff since January 15, 1900, when he became sixty years of age; and (3) the recovery of whatever may be found to be due upon accounting. The defendant demurs: (1)

That the court has no jurisdiction of the person of the defendant; (2) that the court has no jurisdiction of the subject-matter of the action; (3) that there is a defect of parties plaintiff and defendant.

An action similar to this was decided in favor of the plaintiff therein, and the judgment affirmed in this court and the Court of Appeals (Harrison vs. Hartford Life Ins. Co., 63 Misc. Rep. 93, 118 N. Y. Supp. 401, affirmed without opinion 137 App. Div. 918, 122 N. Y. Supp. 1130; Id., 201 N. Y. 545, 95 N. E. 1130). It does not appear, however, that in an action any plea to the jurisdiction was interposed.

The defendant argues strenuously that this court will not entertain an action which has for its purpose the regulation of the internal management of a foreign corporation. This argument is based largely upon the supposed inconvenience of carrying on accountings in diverse jurisdiction, and the inability of the courts in this state to enforce a decree against a foreign corporation. This argument is supported by a considerable number of decisions in this and other states, and has recently been strongly asserted, in an action like this, against this same defendant in the Supreme Court of Missouri. State ex rel. Hartford Life Insurance Co. vs. Shain, 245 Mo. 78, 149 S. W. 479. See, also, State ex rel. Minnesota Mut. Life vs. Danton, 229 Mo. 187, 129 S. W. 709, 138 Am. St. Rep. 417.

[1, 2] The question is not one, however, to be raised by demurrer. It goes, not to the jurisdiction of the court, but to the question whether the court, having jurisdiction, will exercise it, and that depends upon whether or not the court could enforce a judgment if it made one. Strictly speaking, the action is one of which the court has jurisdiction, if the circumstances are such as to justify its exercise. It has jurisdiction of the person of the defendant because process has been served in the manner provided by law. That the complaint states facts sufficient to constitute a cause of action, and one of which the court has jurisdiction, has been established by Harrison vs. Hartford Life Insurance Co., supra.

[3] The question which the defendant seeks to raise, and which has been so strenuously argued before us, can more properly be raised when the plaintiff applies to the court for judgment. It can then be determined to what judgment, if any, the plaintiff is entitled which the court can enforce.

It follows that the judgment appealed from must be affirmed, with costs, with leave to said appellant to withdraw its demurrer and answer within twenty days upon payment of all costs. All concur.

**SUPREME COURT OF NEW YORK.
APPELLATE DIVISION, THIRD DEPARTMENT.**

GORMAN

vs.

METROPOLITAN LIFE INS. CO.*

1. INSURANCE—ACTION ON POLICY—ISSUES AND PROOF.

Where, in an action on a life policy, the complaint made the entire policy a part thereof by reference, alleging that plaintiff had performed all the conditions and obligations required by the contract, the application for which contained a warranty that the declarations made to the medical examiner were correct and wholly true, and it was admitted that the insured at the time of the application had been under treatment for epilepsy, and a year after the policy was issued was adjudged a lunatic, and shortly thereafter died, plaintiff was not entitled to prove under the pleadings that she and insured did not answer any of the questions involving the health and mental condition of the latter, and that such noninsurability was known to defendant's agents who procured the policy.

(For other cases see Insurance, Cent. Dig. §§ 1554, 1632-1644; Dec. Dig. § 645.)

2. INSURANCE—HEALTH OF APPLICANT—NONINSURABILITY.

Since notice to an agent is not notice to the principal, unless the agent's knowledge is acquired in connection with his acts as agent, notice to a soliciting agent of a life insurance company of the physical condition of an applicant, which was such that the contract could not have been consummated without operating as a fraud on the insurer, was not notice to it; all inquiries concerning the applicant's physical condition being within the exclusive jurisdiction of the medical examiner.

(For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. § 378.)

Appeal from Albany County Court.

Action by Mary Gorman against the Metropolitan Life Insurance Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed, and new trial granted.

Argued before Smith, P. J., and Kellogg, Lyon, Howard, and Woodward, JJ.

Martin T. Nachtmann, of Albany, for Appellant.

Robert W. Scott, of Albany (Nathaniel Niles, of Albany, of counsel), for Respondent.

WOODWARD, J.

[1] The plaintiff brings this action to recover the sum of \$500 upon a policy of insurance issued by the defendant upon the life of Thomas P. Gorman, payable to the plaintiff. The

* Decision rendered, November 12, 1913. 143 N. Y. Supp. 1063.

policy bears date of May 17, 1910, and the insured died on the 16th day of November, 1911. The complaint, in addition to the formal allegations, avers on information and belief that "on or about the 17th day of May, 1910, the said defendant, Metropolitan Life Insurance Company, entered into a contract with Thomas P. Gorman, and issued a policy of life insurance upon the life of said Thomas P. Gorman in the sum of \$500, which policy is known as No. 1371924 C, and plaintiff refers to said original policy for all the conditions and qualifications therein expressed, and makes it a part of this complaint;" that the plaintiff is the mother of said Thomas P. Gorman, and the beneficiary named in the policy, and that "on or about the 16th day of November, 1911, the said Thomas P. Gorman died, and proofs of his death were duly received and accepted by the said defendant as required by said contracts and policy, and that the said Thomas P. Gorman and the plaintiff have performed all the conditions and obligations required of them, or either of them, in and by the said contract and policy." The complaint then alleges the nonpayment of the same, and demands judgment.

The answer admits the incorporation of the defendant and the refusal to pay the sum of \$500, and denies knowledge or information sufficient to form a belief as to the remaining allegations of the complaint, with some immaterial exceptions so far as any question here involved is concerned. The defendant sets up as a defense that the policy in suit was issued upon the basis of the answers, statements, and representations contained in the printed and written application for said policy, signed by said Mary Gorman and Thomas P. Gorman, which application was a part of said contract of insurance, and all of which statements, answers, and representations therein referred to were made to induce the defendant to issue the said policy, and as a consideration therefor and said policy was issued and accepted upon the declaration and agreement that the statements, answers, and representations in said application, and those made to the medical examiner, were correct and wholly true, and that they should form the basis of the contract of insurance, if one be issued. It then alleges that the contract never became operative because of the falsity of the statements made in reference to the previous physical condition of the insured, setting out various specific matters.

Upon the trial the plaintiff proved the formal facts in relation to the policy and death of the insured, and rested. It was stipulated that the policy of insurance was issued, and that such policy might be admitted in evidence; that the said Thomas P. Gorman, the insured mentioned in said application and policy, was an inmate of, and under treatment for fits of epilepsy in, an institution under the supervision of the state of New York, known as the Craig Colony, from the 4th day of October, 1909, to the 7th of October, 1909; that the physician's certificate

necessary to obtain admission to said institution was signed by Dr. M. D. Stevenson, of Albany, N. Y.; that thereafter and upon a verified petition of the plaintiff herein, dated July 18, 1911, the said Thomas P. Gorman was duly adjudged a lunatic, and was confined in a state institution up to the time of his death.

The stipulated facts practically established the defendant's defense, but upon a motion to dismiss the complaint the learned trial court permitted the plaintiff to reopen the case for the purpose of establishing that the soliciting agents of the defendant company knew of the facts as they then appeared in the case before the policy was issued. There was no amendment of the pleadings; the complaint alleged a full compliance with the terms and conditions of the policy; the policy being made a part of the complaint. The policy, with the application constituting a part of the same, contains statements, purporting to have been made by the insured to the medical examiner, which are directly contradictory of the stipulation above referred to, and which, if disclosed to the defendant's officers would undoubtedly have prevented the issuing and delivery of the policy, and just how the plaintiff, under her pleadings, could be heard to say that the policy under which she claimed was not the real contract entered into by the insured we are unable to understand. No fraud or bad faith is alleged in the complaint. It sets forth a valid policy upon its face, based upon statements alleged to have been made by the insured to the medical examiner, and which are set forth in the policy under which the claim is made, and without which the policy would not have been issued. Conceding upon the trial that these statements were false, what possible right, under her pleadings, had she to show that the policy, with its application constituting a part of the contract, was not in fact the contract which was made? She claimed the right to recover upon the policy just as it appeared upon its face; there was no suggestion of any excuse for nonperformance of any of the conditions, but an allegation that both she and the insured had performed all of the conditions imposed by the contract, one of which was that the insured had agreed—

"that the foregoing statements and answers, and also the statements and answers to the medical examiner, are correct and wholly true, and that they shall form the basis of the contract of insurance if one be issued."

This condition of the policy, according to the plaintiff's subsequent testimony, has not been performed because she says that the insured did not answer any of these questions involving his health and mental condition. If he did not, then the contract, as alleged in the complaint as having been fully performed on the part of the insured, has not been performed in this particular; the insured has never made truthful answers to the questions asked, and which it is agreed in the application shall form the

basis of the contract. The defendant was not called upon to anticipate a claim which had not been pleaded; the plaintiff alleged the making and delivery of the contract set forth as a part of the complaint, and she has been permitted to recover upon an entirely different theory—upon the theory that some other and different contract was made. The principle still remains that the judgment to be rendered by any court must be "secundum allegata et probata," and this rule cannot be departed from without inextricable confusion and uncertainty and mischief in the administration of justice. Parties go to court to try the issues made by the pleadings, and courts have no right impromptu to make new issues for them, on the trial, to their surprise or prejudice, or found judgments on grounds not put in issue, and distinctly and fairly litigated. Wright vs. Delafield, 25 N. Y. 266, 270. No suggestion is made in the pleadings of a waiver on the part of the defendant; the contract is pleaded as it stands, with the alleged answers of the insured constituting a part of the contract, and the court has permitted the plaintiff to recover upon the theory that the defendant, through its agent, has waived this part of the contract, because of the alleged knowledge of these agents that the answers were not true. Such proof was clearly inadmissible, and there was error in receiving the same over the objection of the defendant. Garlick vs. Metropolitan Life Ins. Co., 109 App. Div. 175, 95 N. Y. Supp. 645.

[2] We are of the opinion that the court erred in refusing to charge, as requested, that:

"If the jury believe the statements of the plaintiff and her witnesses that the insured or the plaintiff disclosed to the soliciting agent or soliciting agents of defendant the true state of his health and physical condition before going before the medical examiner, or of his having been an inmate of Craig Colony for epilepsy, such evidence is not binding on the defendant, and any such notice or information as to the health or physical condition of the insured given to such soliciting agents is not knowledge chargeable to the defendant."

There can be no doubt that under a proper pleading it might be shown that the medical examiner had failed to report correctly the answers given him upon the examination, and that such answers were in fact truly made, and such a mistake or fraud would be chargeable to the defendant, but that the knowledge of mere soliciting agents, who have nothing to do with the issuing of the policy or with the inquiry into the physical condition of the insured, is notice to the company, is not supported by reason or authority. Notice to an agent is not notice to the principal unless the agent's knowledge is acquired in connection with his acts as agent, and it clearly appears in this case that the soliciting agents were not called upon to know anything of the physical condition of the applicant; all inquiries in this regard

being made by the medical examiner. This is clearly the doctrine of the court in *Butler vs. Michigan Mutual Life Insurance Co.*, 184 N. Y. 337, 77 N. E. 398, and the defendant was entitled to have the law stated to the jury, though the error of admitting the testimony could not have been cured by the charge if made as requested. The refusal of the court merely emphasizes the original error.

It is clear that Thomas P. Gorman was not a legitimate risk at any time involved in this transaction; the contract could not have been consummated without operating as a fraud upon the defendant, and, while it is probably true that the defendant would be liable if the fraud was perpetrated by the medical examiner, the pleadings in this case did not, and do not now, open the way for any such proof. The cause of action alleged assumes a legitimate policy just as it stands, and the proof offered shows that the policy pleaded never had any existence, accepting the plaintiff's own version, for the insured made none of the answers which are accredited to him, and he has not performed the conditions precedent to the issuing of the policy on which the action is predicated.

The judgment and order appealed from should be reversed, and a new trial granted, with costs to the appellant to abide the event. All concur.



COURT OF APPEALS OF KENTUCKY.

NEW YORK LIFE INS. CO.

vs.

CONNER.*

I. INSURANCE—WAIVER OF FORFEITURE—FAILURE TO CANCEL POLICY.

A life insurance policy provided that, upon default of the payment of a premium or interest on any debt, the policy should automatically continue as term insurance for one month and then automatically become paid-up insurance for a specified amount. The company made a loan to the insured receiving the policy as collateral security, and the insured defaulted in the payment of the next premium. The note and policy were retained by the company, and no notice was sent to the insured, and no indorsement made upon the policy until one month after the death of the insured and six months after default was indorsed on the policy and it was mailed to the insured; the company being ignorant of his death. *Held*, that neither the failure of the com-

* Decision rendered, Nov. 14, 1913. 160 S. W. Rep. 491.

pany to take action prior to the death of the insured, nor the subsequent indorsement upon the policy, constituted a waiver by the company of the provisions of the policy, and it was liable only for the excess of the paid-up insurance over the amount of the loan.

(For other cases, see Insurance, Cent. Dig. §§ 194, 936, 939; Dec. Dig. § 368.)

2. INSURANCE — WAIVER OF FORFEITURE — DEMAND FOR PAYMENT.

A provision of a life insurance policy for forfeiture for nonpayment of a premium note may be waived by the company's retention of the note and making an unconditional demand for the payment thereof.

(For other cases, see Insurance, Cent. Dig. §§ 1041-1056, 1058-1070; Dec. Dig. § 392.)

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by Florence M. Conner against the New York Life Insurance Company. Judgment for the plaintiff, and defendant appeals. Reversed and remanded.

Keith L. Bullitt, of Louisville, James H. McIntosh, of New York City, and Bruce & Bullitt, of Louisville, for Appellant.

D. A. Sachs, Jr., of Eminence, and M. A., D. A. & J. G. Sachs, of Louisville, for Appellee.

CLAY, C.

On June 27, 1904, the New York Life Insurance Company issued to Lounett Thomas Conner a policy of insurance, insuring his life in favor of his wife, Florence M. Conner, in the sum of \$3,000. Lounett Thomas Conner died November 23, 1911. Plaintiff, Florence M. Conner, brought this action to recover on the policy. A demurrer was sustained to the amended answer of the defendant, and judgment rendered in favor of plaintiff for the amount of the policy, less the indebtedness thereon, and the amount of the premium due June 27, 1911. Defendant appeals.

The annual premium on the policy was \$128.37. All the premiums up to and including that for the year 1910 were paid. On about April 1, 1911, the insured borrowed from the defendant the sum of \$525. To secure the payment of this indebtedness, he deposited the policy of insurance with the company as collateral security. The policy provides as follows: "If any premium or interest is not paid on or before the date when due, after the policy has been in force two full years, and if there is an indebtedness to the company, insurance for the net amount that would have been payable as a death claim immediately before such due date, will automatically continue from such due date, as Term Insurance for one month; if the policy is not restored within said month as herein provided, the insurance will thereafter automatically become a paid-up insurance for an amount payable to the designated beneficiary only in event of death of the insured before the end of the accumulation period, and for the amount of cash payable to

the insured at the end of the accumulation period only if then living, such amounts to bear the same proportion to the amounts stated in column 2 and column 3, respectively, of the table on the second page, as any excess of the reserve under this policy calculated according to the American Table of Mortality with interest at $4\frac{1}{2}$ per cent over such indebtedness, bears to the reserve itself."

The premium due in advance on June 27, 1911, was not then paid, nor was any note executed for it, nor any arrangement of any kind made by the insured with reference thereto. No demand was made on the insured for the payment of that premium, nor did any communication pass between him and the company. At the time of the death of the insured on November 23, 1911, the premium due on June 27, 1911, had not been paid nor had any portion of the indebtedness of \$525 on the policy been paid. The value of the paid-up insurance available on the policy on June 27, 1911, was \$738. The reserve under the policy was \$567. The excess of the reserve over the indebtedness was \$42. The proportionate amount of paid-up insurance payable to the beneficiary in the event of the insured's death before the end of the accumulation period was \$54.60. The foregoing facts appear from the answer of the defendant. By amended answer the company alleged that upon the failure of the insured to pay the premium on June 27, 1911, and upon his failure to restore the policy within 30 days thereafter, it thereupon treated and considered the policy lapsed, subject to the insured's right to automatic paid-up insurance; that on December 29, 1911, the company, in ignorance of the death of the insured, mailed the policy to him, and, in order to call his attention to his nonforfeiture rights, made upon the policy the following indorsement: "In accordance with the terms of the loan agreement of the 1st of April, 1911, and on account of the default of the payment of the June 27, 1911, premium and loan interest, this policy is continued for the reduced amount of \$54.60 for a term of 13 years from June 27, 1911, to June 27, 1924, with a cash payment of \$41.00 at that date if insured is then living. New York, Dec. 29th, 1911."

[1] It will be observed that the policy contract provides that if any premium or interest is not paid on or before the date when due after the policy has been in force two full years, and there is an indebtedness to the company, insurance for the net amount that would have been payable as a death claim immediately before such due date will automatically continue from such due date as term insurance for one month. But if the policy is not restored within that month, as provided by the contract, the insurance will thereafter automatically become a paid-up insurance for a certain amount. Indeed, the contract is substantially the same as section 659, Kentucky Statutes. In the present case there was an indebtedness against the policy, and the insured defaulted in the payment of the premium due June 27, 1911. The policy was not

restored within a month after the default. Therefore the policy was automatically converted into paid-up insurance unless this provision of the contract was waived by the company. In sustaining the demurrer to the company's answer, the trial court proceeded on the theory that although the policy provided for automatic paid-up insurance for a reduced amount, the fact of the company's having deemed it necessary to make an indorsement on the policy to that effect would indicate that so far as the company's rights were affected the change was not to be an automatic one, but at its election, and not having made this election when it was due, to wit, July 29, 1911, or at any time prior to the date of indorsement, to wit, December 29, 1911, which was more than five months after the election should have been made and more than one month after the insured died, such contract on the part of the company was sufficient to constitute a waiver of the provisions of the policy relied on. In support of this position we are cited to the case of *New York Life Insurance Co. vs. Evans*, 136 Ky. 391, 124 S. W. 376. In that case the facts were these: The policy provided that, in case of lapse for nonpayment of premium, "a paid-up policy will be issued on demand," etc. The insured, in part payment of the premium, on April 20, 1904, executed a note payable on October 20, 1904. The note was not paid at maturity. The company retained the note and wrote the insured a number of letters urging reinstatement. In addition to this, several witnesses testified that in some of the letters the company demanded payment of the note. The insured mailed to the company on January 19, 1905, a check for the amount of the note, and the company cashed the check and held the proceeds pending the receipt of the health certificate and application for reinstatement. The insured died January 20, 1905. The company denied liability for the face of the policy on the ground that the policy had lapsed for nonpayment of the premium note when the same fell due, and insisted it was liable only for the amount of paid-up insurance provided for in the nonforfeiture clause of the policy. The beneficiary contended that, by urging the payment of the note and holding it as a subsisting obligation of the insured, the company indicated an intention to waive the failure of the insured to pay the note promptly when due. The judgment was reversed because of error in the instructions, but the court held that there was some evidence of a waiver, and remanded the case for a new trial upon the issue whether or not the company, by its conduct, indicated an intention to waive the payment of the note.

[2] That case did not extend the waiver doctrine, but simply applied the old rule in force that, where a provision in an insurance policy provides for the lapse of the policy for nonpayment of a premium note, the provision may be waived by the insurer's retention of the note and making an unconditional demand for payment. *Limerick vs. Home Insurance Co.*, 150 Ky. 827, 150

S. W. 978; Moreland vs. Union Central Life Insurance Co. 104 Ky. 129, 46 S. W. 516, 20 Ky. Law Rep. 432; Walls vs. Home Insurance Co. of N. Y., 114 Ky. 611, 71 S. W. 650, 24 Ky. Law Rep. 1452, 102 Am. St. Rep. 298; Moore vs. Continental Insurance Co., 107 Ky. 273, 53 S. W. 652, 2 Ky. Law Rep. 977. The doctrine of these cases is based on the fact that in each instance the company showed an unequivocal election to treat the policy as a subsisting obligation. On the other hand, in the case of Continental Insurance Co. of N. Y. vs. Peden, 145 Ky. 775, 141 S. W. 43, the company notified appellee that his policy had elapsed by reason of the nonpayment of the premium note. At the same time it reminded him of the fact that, if he wished to revive his insurance, he would have to pay the note. There was no unconditional demand for payment, but merely a notice or request to pay in the event the insured desired to revive the insurance. It was held that such request did not constitute a waiver. It has likewise been held in a number of cases that the right to enforce a forfeiture for nonpayment of a premium or a premium note is not waived by mere silence or inaction on the part of the company. Franklin Ins. Co. vs. McAfee, 90 S. W. 216, 28 Ky. Law Rep. 676; Manhattan Life vs. Savage, 63 S. W. 278, 23 Ky. Law Rep. 483; Crutchfield vs. Union Central, 113 Ky. 53, 67 S. W. 67, 23 Ky. Law Rep. 2300; N. Y. Life vs. Warren Deposit Bank, 75 S. W. 234, 25 Ky. Law Rep. 325; Manhattan Life vs. Pentecost, 105 Ky. 642, 49 S. W. 425, 20 Ky. Law Rep. 1442, 1443; Union Central vs. Duvall, 46 S. W. 518, 20 Ky. Law Rep. 441, 443.

In the present case it was the duty of the insured to pay the premium promptly, and it was provided in the policy that in the event of nonpayment the policy should automatically lapse and be converted into paid-up insurance. The policy did not require affirmative action on the part of either the company or the insured. All that it is claimed that the insurer did was to retain the note and the policy. The company made no demand on the insured for the payment of the premium note past due or the indebtedness on the policy. It remained silent and inactive. In our opinion, this did not constitute a waiver of the provision with reference to paid-up insurance. Nor can we see how the indorsement made on the policy after the insured's death affects the question one way or another. Unless there was a waiver of the provision by the company, the rights of the parties were fixed by the contract. No indorsement on the policy was necessary to give effect to its provisions. It neither added to nor subtracted from the rights of the parties. It follows that the court erred in sustaining the demurrer to defendant's answer.

We have considered this case from the standpoint of the sufficiency of the answer as amended. Other questions are discussed

by plaintiff; but, in view of the fact that they are not presented by the pleadings, we deem it unnecessary to consider them.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.



SUPREME COURT OF NORTH CAROLINA.

GARDNER

vs.

NORTH STATE MUT. LIFE INS. CO.*

1. INSURANCE—BINDING SLIP—EFFECT.

The binding slip issued on an application for insurance is a mere written memorandum of the most important terms of a preliminary contract of insurance, intended to give temporary protection pending the investigation of the risk by the insurer, or until the issue of a formal policy, and is subject to all the conditions of the contemplated policy, even though it may never issue.

(For other cases, see Insurance, Cent. Dig. § 210; Dec. Dig. § 132.)

2. INSURANCE—BINDING SLIP—EFFECT.

When properly issued on an application for insurance, a binding slip protects the applicant against the contingency of sickness between its date and the delivery of the policy, if the application is accepted; but, if not, the binding slip ceases eo instanti to have any effect.

(For other cases, see Insurance, Cent. Dig. § 210; Dec. Dig. § 132.)

3. EVIDENCE—PAROL EVIDENCE—INSURANCE POLICY—FALSIFICATION.

In a suit on a life policy, the insurer may show that the manual delivery of the policy was conditional, or it may prove fraud or other equitable matter to show that it never took effect as a contract; but, when the policy is once delivered and becomes effective, statements therein which, if falsified, will affect its continued validity cannot be contradicted with a view to avoid the insurance.

(For other cases, see Evidence, Cent. Dig. §§ 1818-1824; Dec. Dig. § 405.)

4. INSURANCE—LIFE POLICY—FALSE REPRESENTATIONS.

Where an applicant for insurance falsely represented that he had not been intimately associated with any one suffering from any transmissible disease within the past year, such representation being material vitiated the so-called binding receipt, and the policy subsequently issued thereon, unless the insurer waived the same with full knowledge of the facts.

(For other cases, see Insurance, Cent. Dig. § 678; Dec. Dig. § 299.)

* Decision rendered, Oct. 29, 1913. 79 S. E. Rep. 806.

5. INSURANCE—FALSE REPRESENTATIONS—MATERIALITY.

Every fact which is untruly stated or wrongfully suppressed in an application for insurance must be regarded as material, if the knowledge or ignorance of it would naturally and reasonably influence the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk or in fixing the premium.

(For other cases, see Insurance, Cent. Dig. § 548; Dec. Dig. § 255.)

6. INSURANCE—APPLICATION—REPRESENTATIONS.

Where, in an application for insurance, a fact is subsequently inquired about, or a question is so framed as to call for a true statement of such fact, or to elicit the information desired, the applicant is required to make a full and fair disclosure thereof, or at least a substantial one.

(For other cases, see Insurance, Cent. Dig. §§ 538-542; Dec. Dig. § 253.)

7. INSURANCE — FALSE REPRESENTATIONS — STATUTES — CONSTRUCTION.

Revised 1905, § 4808, declares that all statements in an application for insurance shall be construed as representations merely, and not as warranties, and that no representation, unless material or fraudulent shall prevent a recovery. *Held*, that a material misrepresentation under such section will avoid a policy, if it is calculated to influence the insurer in making the contract, or in estimating the degree or character of the risk, or in fixing the premium, if it is without knowledge of the falsity thereof.

(For other cases, see Insurance, Cent. Dig. §§ 540, 549; Dec. Dig. § 256.)

8. INSURANCE — FALSE REPRESENTATIONS — WAIVER — KNOWLEDGE.

Where insured in his application falsely stated that he had not been intimately associated with any one suffering from any transmissible disease within the past year, when in fact he had nursed his wife and child through typhoid fever, of which disease he subsequently died, the insurer could not have waived such misrepresentation in the absence of a showing that it had knowledge thereof.

(For other cases, see Insurance, Cent. Dig. §§ 942, 966, 967, 975-997; Dec. Dig. § 377.)

9. INSURANCE—FRAUD—PARTICIPATION BY AGENT.

Where the agent of an insurance company wrongfully delivers a policy with knowledge of a materially false representation therein on which it was issued, he ceases in that transaction to represent the company, and acts in his individual capacity, participating in the fraud of insured, which vitiates the policy.

(For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. § 378.)

10. INSURANCE — POLICY — DELIVERY — FAITHLESS AGENT — KNOWLEDGE—IMPUTATION TO INSURER.

Where an insurance agent, faithless to his trust, delivers a policy to insured with knowledge that insured is then suffering from his last illness, and has made a material misrepresentation in the application, the agent's knowledge will not be imputed to insurer.

(For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. § 378.)

Appeal from Superior Court, Edgecombe County; Cline, Judge.

Action by Eula B. Gardner against the North State Mutual

Life Insurance Company. Judgment for defendant and plaintiff appeals. Reversed.

This is an action to recover the amount of an insurance policy, alleged to have been issued by the defendant in March, 1912, on the life of John B. Gardner, in favor of the plaintiff, who was his wife. John B. Gardner died in March, 1912, shortly after he made his application for insurance, and the policy was delivered to him by defendant's local agent during his last illness; he being then sick with typhoid fever, which caused his death. The application contained a representation by him that he had not been intimately associated with any one suffering from any transmissible disease within the year before his death. At the time of the application, and after the examination of the applicant by a physician, said agent issued what is called in the case a "binding receipt," one of the provisions of which is the following: "In the event this policy shall be approved by the medical director of the company, then the insurance applied for shall be deemed to relate back to and be in force from and after the date of this receipt, but not otherwise." And also the following provision: "That the company shall not incur any liability under this application unless the policy has been issued, delivered, and paid for while I am in good health." The issues and answers thereto by the jury will disclose the nature of the controversy, and sufficiently present the question upon which the opinion of the court rests. They are as follows: "(1) Did John B. Gardner represent in his application for insurance that he had not, at the time of his application, been intimately associated with any one suffering wth any transmissible disease within the past year? A. Yes. (2) Had said Gardner, within the year prior to his application, been intimately associated with any one suffering with any transmissible disease? A. Yes. (3) Was said representation material to a contract of insurance between the said Gardner and the defendant? A. Yes. (4) Was the said Gardner sick with typhoid fever at the time that the policy in question was left with him by B. H. Howle? A. Yes. (5) Did the defendant manager at Rocky Mount (V. T. Lamb) ratify the act of Howle in issuing the 'binding receipt' and the delivery of the policy in pursuance thereof? A. Yes. (6) Did the policy in question, at the time it was left with said Gardner by said Howle, become a consummated contract of insurance between the defendant and the insured? A. Yes. (7) In what amount, if anything, is the defendant indebted to the plaintiff? A. \$1,000." The court set aside the verdict upon the sixth and seventh issues, and, having given judgment for the defendant upon those which remained, the plaintiff appealed, reserving her exceptions.

E. B. Grantham and F. S. Spruill, both of Rocky Mount, for Appellant.

Rouse & Land, of Kingston, for Appellee.

WALKER, J.

[1] This case has not been tried upon the real and decisive issue raised by the pleadings; but we will consider this question presently and in its order. A careful review of the evidence, the course of the trial and development of the case, the charge of the court and the issues, leads us to conclude that the jury disobeyed the instructions upon the sixth issue, and it may be clearly inferred that the trial judge set aside the verdict as to the sixth and seventh issues because of this fact. The jury were charged that, if it was found from the evidence the representation in the application mentioned in the first three issues was material, they should answer the sixth issue, "No," or, if they found that the agent of defendant, V. T. Lamb, did not ratify the "binding receipt" (if it was void), and that John B. Gardner was sick with typhoid fever when he received the policy, they should answer the sixth issue, "No," even though they found that the representation was not material. This instruction was not followed by the jury. The false and material representation has something to do with the "binding receipt" and to the extent hereinafter indicated. The effect of the "binding receipt" was correctly stated by Judge Cline, and it is thus defined in Vance on Insurance, p. 160: "The binding slip is merely a written memorandum of the most important terms of a preliminary contract of insurance intended to give temporary protection pending the investigation of the risk by the insurer, or until the issue of a formal policy. By intendment it is subject to all the conditions in the policy to be issued. These informal writings are but incomplete and temporary contracts—memoranda given in aid of parol agreements. Such memoranda usually fix all the essential provisions that are variable; but they are not ordinarily intended to include all the terms of the agreement, and always look to the formal policy that is expected subsequently to issue for a complete statement of the contract made. Hence, as heretofore stated the contract evidenced by the binding slip is subject to all the conditions of the contemplated policy, even though it may never issue, and the same is true of other informal written contracts." Lipman vs. Insurance Co., 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719.

In what has been said or what will hereinafter be said, it must not be understood that we are deciding whether, where a "binding slip" has been delivered to the applicant, the company, in the event of his death or illness occurring subsequently, but before the acceptance of the application, can arbitrarily or even unreasonably reject it or withhold its approval or the approval of the medical director, and thereby avoid its liability, under the clause in the binding slip requiring the approval of the application by the medical director of the company before the insurance shall take effect. This course was taken in Grier vs. Insurance Co., 132 N. C. 542, 44 S. E. 28; the policies having been delivered

in both cases, the only difference in the two being that in Grier's Case there was no allegation of fraud or a false and material representation, while in this case there is. We are confining ourselves to a consideration of the false representation and its effect upon the later transactions. Nor do we pass upon the question whether the "binding slip" was actually delivered, as the jury have, by clear implication from their answer to the fifth issue found as a fact that it was, contrary to defendant's contention that it was not delivered.

[2] When properly executed, the "binding slip" protects the applicant for insurance against the contingency of sickness intervening its date and the delivery of the policy, if the application for insurance is accepted. If the application is not accepted in the proper exercise of the company's right and the insurance, therefore, is refused, the "binding slip" ceases eo instanti to have any effect. It does not insure of itself, but is merely a provision against any illness supervening it, if there is afterwards an acceptance of the application, upon which it depends for its vitality. This view, which is the prevailing one, if there is anything to the contrary, is clearly stated by the Chief Justice in *Grier vs. Insurance Co.*, 132 N. C. 542, 44 S. E. 28, where it is said that the risk of future illness, that is, after the date of the "binding receipt," is taken by the company, if it afterwards accepts the application, or the insurance becomes effective, and the insurance relates back to the date of the receipt, and, further, that the receipt of the premium acknowledged in the policy, and the recital of the fact that the policy was delivered while the insured was in good health, cannot be contradicted, in the absence of fraud or other sufficient equitable element, as they affect the validity of the contract of insurance, which cannot be impeached in this collateral way. This is sound doctrine, when confined within its proper limits, and not only is it such, but it is also eminently just.

[3] The company can show that the manual delivery of the policy was conditional, for this goes to the execution of the contract, or it may prove fraud or other equitable matter in the same way, for the purpose of showing that it never took effect as a contract, as in *Garrison vs. Machine Co.*, 159 N. C. 285, 74 S. E. 821, *Pratt vs. Chaffin*, 136 N. C. 350, 48 S. E. 768, and *Powell vs. Insurance Co.*, 153 N. C. 124, 69 S. E. 12; but, when the policy is once delivered, and becomes effective as a contract, statements therein which, if falsified, will affect its continued validity, cannot be contradicted with a view to avoid the insurance. The entire subject is fully discussed in Grier's Case, *supra*, and to some extent in *Kendrick vs. Insurance Co.*, 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592, and *Rayburn vs. Casualty Co.*, 138 N. C. 379, 50 S. E. 762, 107 Am. St. Rep. 548. See, also, Joyce on Insurance, § 64.

[4, 5] It became material to inquire whether the company, by its agent with competent authority, had ratified the execution of

the binding receipt, as the policy itself was delivered to John B. Gardner while he was ill with typhoid fever, which resulted in his death; the application, which he signed, providing that it should be issued and delivered and the premium paid while he is in good health, in order to be binding upon the company. We will not stop to consider the question whether the evidence was sufficient to warrant the peremptory instruction of the court that V. T. Lamb had the requisite power to ratify, as the evidence may be changed at the next trial, and present the matter in a different aspect, rendering premature and futile any discussion of it at present, and besides, this decision may cause it to be considered in a different way. Of course, an agent must have authority in order to bind his principal. This is axiomatic. *I Joyce on Insurance*, § 64. But, as we have intimated, the underlying question in this case, which affects both what is called the "binding slip or receipt" and the validity of the policy is whether the company, by itself or its duly authorized agent, has waived the benefit of the false representation made in the application, with full knowledge of the facts. If the representation made in the application was false and material, and the jury so found, and the company was ignorant of its falsity, it vitiates the so-called binding receipt and the policy, unless the company has in some way waived it by its conduct, and with full knowledge of the facts. "A false representation avoids a contract of insurance when material and wholly without reference to the intent with which it is made, unless it is otherwise provided by statute." *Vance on Insurance*, p. 269. We need not inquire whether this rule is too broadly stated by Mr. Vance, as it applies with the meaning intended by him to the facts of this case, and it has been stated by this court substantially in the same terms. Every fact which is untruly stated or wrongfully suppressed must be regarded as material, if the knowledge or ignorance of it would naturally and reasonably influence the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of premium. *16 Am. & Eng. Enc. of Law* (2d Ed.) 933; *Vance on Insurance*, 284. This definition was adopted by us in *Fishblate vs. Fidelity Co.*, 140 N. C. 589, 53 S. E. 354, and has since been approved several times, and is also the definition of other courts. *Bryant vs. Insurance Co.*, 147 N. C. 181, 60 S. E. 983; *Alexander vs. Insurance Co.*, 150 N. C. 536, 64 S. E. 432; *Annuity Co. vs. Forrest*, 152 N. C. 621, 68 S. E. 139; *Ætna L. Ins. Co. vs. Conway*, 11 Ga. App. 557, 75 S. E. 915; *Maddox vs. Insurance Co.*, 6 Ga. App. 681, 65 S. E. 789; *Talley vs. Insurance Co.*, 111 Va. 778, 69 S. E. 936; *Penn M. Life Insurance Co. vs. M. S. & Trust Co.*, 72 Fed. 413, 19 C. C. A. 286, 73 Fed. 653, 19 C. C. A. 316, 38 L. R. A. 33, 70; *Cooley's Briefs on Insurance*, p. 1953; *Vance on Insurance*, pp. 267, 269.

[6, 7] It may be stated as a general rule that where, in an application for insurance, a fact is specifically inquired about,

or the question is so framed as to call for a true statement of the fact, or to elicit the information desired, reason and justice alike demand that there should be a fair and full disclosure of the fact, or at least a substantial one. 3 Cooley's Briefs on Insurance, p. 2009 (d.) Our case is not essentially different from Alexander vs. Insurance Co., *supra*, in which this court said: "The company was imposed upon (whether fraudulently or not is immaterial) by such representation and induced to enter into the contract. In such case it has been said by the highest court that: 'Assuming that both parties acted in good faith, justice would require that the contract be canceled, and premiums returned.' Insurance Co. vs. Fletcher, 117 U. S. 519 [6 Sup. Ct. 837, 29 L. Ed. 934]—" citing Bryant vs. Insurance Co., *supra*, as decisive of the question. Our statute (Revisal of 1905, § 4808) affirms this view, for, while it declares that all statements in an application for insurance, shall be construed as representations merely, and not as warranties, it further provides that no representation, unless material or fraudulent, shall prevent a recovery, the meaning of which plainly is that a material representation shall avoid the policy, if it is also false and calculated to influence the company, if without notice of its falsity, in making the contract at all, or in estimating the degree and character of the risk, or in fixing the premium. Bryant vs. Insurance Co., *supra*. Our case is well within this rule. It is not necessary, as said in Fishblate's Case, that the act or conduct of the insured, which was represented by him in the application, should have contributed in some way or degree to the loss or damage for which the indemnity is claimed. Whether it was material depends upon how, if at all, it would have influenced the company in the respect we have just stated. The determining factor, therefore, in such case is whether the answer would have influenced the company in deciding for itself, and in its own interest, the important question of accepting the risk, and what rate of premium should be charged. The questions generally are framed with a view to estimating upon the longevity of the applicant, and any answer calculated to mislead the company in regard thereto should be considered as material. There are some contingencies that cannot be provided against; but the company is entitled to have a fair and honest answer to every question, which will enable it to exercise its judgment intelligently, and to have the necessary information as a basis upon which to make its calculations, although its best deduction therefrom may only approximate the actual result in the particular case. 3 Cooley's Briefs in Law of Insurance, pp. 1952, 1953; *Aetna L. Ins. Co. vs. Conway*, 11 Ga. App. 557, 75 S. E. 915. The applicant is required to act in the utmost faith in giving the information. *Aetna L. Ins. Co. vs. Conway*, *supra*.

In life insurance, it is important for the company to know the individual history and characteristics of the applicant, his

idiosyncracies, or the peculiarities of his mental and physical constitution or temperament, and his environment at the time of his application. In no other way could the risk or hazard be well determined, or the premium fixed. Is he weak in body or mind, and, if so, to what extent, and in what particular way, and what are his inherited traits or the mental and physical characteristics of his progenitors? The inquiry must not be only individual, but ancestral, and the investigation searching as to his past life and future intentions, as experience has shown, in order to make anything like a reliable estimate of the risk to be incurred. And his habits and surroundings are also to be known, considered, and weighed. Has he been exposed to any contagious, infectious, or transmissible disease, is a perfectly legitimate inquiry. Does he propose to change his residence, so that his exposure to climatic or other diseases will be greater, and the hazard correspondingly increased? These and many other questions of like kind any prudent man engaged in the business of life insurance would be more than likely to ask, and the answers to them would surely tend to shape the judgment of the underwriter and influence his decision in regard to the risk. Any insurance company that would issue a policy or contract for insurance upon any other basis and without proper inquiry would be so reckless as to forfeit the confidence of the public.

However it may be generally, in our case it appears that the applicant had been intimately associated with his wife, who was afflicted with typhoid fever, requiring 17 medical visits for treatment. He nursed his wife and a child in the same house afflicted with the same disease throughout their illness, and shortly afterwards was himself attacked by it, and died. There was ample evidence to show that typhoid fever is transmissible from one person to another in various ways—by flies and other insects, drinking water, milk, and other substances of a like kind, when infected by flies, which carry the fatal germs from the stools or excreta of the typhoid patient. It was testified that, when there is typhoid fever in a house or on the premises, it presents a very dangerous situation for those who occupy them or who visit there, as they are thereby brought in close contact with the germ-laden substances, and are more exposed to infection. A person physically able to resist or throw off the disease may escape, or he may be so fortunate as not to become the victim of the germ-bearers; but he is nevertheless in dangerous surroundings, where the chances of infection are greater than if he were more remote from the premises of the patient. There was also evidence that the application for insurance would have been rejected had the question been correctly answered. John B. Gardner knew, or rather must have known, at the time he answered the question, that he had very recently been intimately associated with his sick wife as her nurse during her severe illness, and the company, if ignorant of the fact, was misled by his answer as to the truth of

the matter. Under the charge of the court, which is sustained by our decisions, and was in accordance with the established doctrine, the jury found that the representation was false, and was also material, and there was evidence to support the finding. This being so, the question is, Did the defendant, with knowledge of the facts by itself or its agent, waive its right to insist upon this false statement, and thereby ratify the "binding slip"? If it did, then, the slip being valid, the company took the risk of the illness of the assured occurring subsequent to its date, and the policy was rightfully delivered by defendant's agent to Gardner, although he was sick at the time. *Grier vs. Insurance Co.*, *supra*. If it did not thus waive its right, the next question will be, Did the agent deliver the policy, not knowing that the statement in the application was false, and being led thereby to believe that the slip was valid, and of itself bound him to deliver the policy, and was he influenced by this fact to deliver the policy? This all relates to the valid execution of the policy, and does not contradict or vary its terms.

[8] It will not be denied, we should think, that there can be no legal waiver of a right without a knowledge of the right which is claimed to have been relinquished. The doctrine is well stated in *29 Am. & Eng. Enc. of Law* at p. 1093: "There can be no waiver, unless the person against whom it is claimed had full knowledge of his rights and of facts which will enable him to take effectual action for their enforcement. No one can acquiesce in a wrong while ignorant that it has been committed, and that the effect of his action will be to confirm it."

[9, 10] If there was any fraudulent or collusive agreement between the agent and Gardner for the delivery of the policy in disregard of the company's rights, it would avoid the entire transaction, and defeat plaintiff's recovery, for fraud vitiates everything. In such case, the agent would be representing himself, and not his principal, and his authority to speak or act for him would cease, as the party claiming the insurance, and who assisted in the fraud, or was particeps criminis, cannot take advantage of his own or the agent's wrong. "A contract made by an agent under the influence of bribery (or fraud or collusion), or one made to the knowledge of the other party, in fraud of the principal, is voidable by the latter." *Tiffany on Agency*, pp. 229-326; *Sprinkle vs. Indemnity Co.*, 124 N. C. 405, 32 S. E. 734. But the other party (here Gardner) must have had knowledge of the principal's right, and that the agent was defrauding his principal, or was disobeying instructions, or acting without the scope of his employment, or he must have colluded with him, and thereby obtained something belonging to the principal without being legally entitled thereto.

"An agent cannot be allowed to put himself into a position in which his interest and his duty will be in conflict, and, if a person who contracts with an agent so deals with him as to give the

agent an interest against the principal, the latter, on discovering the fact, may rescind the contract, notwithstanding that it was within the scope of the agent's authority. Thus, a gratuity given, or promise of commission or reward made to an agent for the purpose of influencing the execution of the agency, vitiates a contract subsequently made by him, as being presumptively made under that influence." Tiffany on Agency, p. 229. Under such circumstances of fraud or collusion, notice to the faithless agent of Gardner's illness or any other vital fact would not be imputed to the company, his defrauded principal. Tiffany on Agency, pp. 262, 263; Sprinkle vs. Indemnity Co., 124 N. C. 405, 32 S. E. 734; Bank vs. Burgwyn, 110 N. C. 267, 14 S. E. 623; Stanford vs. Grocery Co., 143 N. C. 419, 55 S. E. 815. The Sprinkle decision is very much in point, both as to the fraud of the agent and its effect upon the question of notice to the principal of his faithless conduct. The case, in this aspect, may be submitted to the jury, if the defendant so desires, and tenders a proper issue for the purpose.

We can now see how important it is to have additional issues or a modification of the present ones, except the first four of them, for in the light of the entire case—pleadings, evidence, charge, and verdict—neither the plaintiff nor the defendant was entitled to a judgment; the verdict having fallen short of presenting all the essential facts, and the court, therefore, being unable to determine the rights of the parties and pronounce judgment. As some confusion may arise if we retain any part of the verdict, for instance, as to the first four issues, we will set aside the entire finding, and let the parties begin anew, which will be in the nature of a repleader, though not technically so, and it is so ordered.

New trial.

COURT OF APPEALS OF KENTUCKY.

COMMONWEALTH ET AL.

vs.

PROVIDENT SAVINGS LIFE ASSUR. SOC.*

On motion for rehearing. Motion granted, and former opinion modified.

For former opinion, see 159 S. W. 698.

Response To Petition For Modification.

HANNAH, J.

Appellee asks a modification of the opinion herein (155 Ky.)

* Decision rendered, Nov. 13, 1913. 160 S. W. Rep. 476.

197, 159 S. W. 698) eliminating therefrom the imperative direction that the lower court render judgment against it for the premiums received. This language having been inadvertently used, the petition is granted, the opinion is modified by the withdrawal of said direction, and the case is remanded, with direction to sustain the demurrer of the commonwealth to the answer, and for further proceedings consistent with the opinion.

ROUSSEAU vs. BROTHERHOOD OF AMERICAN YEO-MEN.*

(Supreme Court of Michigan.)

1. WITNESSES—COMPETENCY—TRANSACTION WITH PERSON SINCE DECEASED—“AGENT OF CORPORATION.”

Where in an action on a mutual benefit certificate, defendant pleaded that when insured died the certificate had been canceled for nonpayment of dues, a witness who was employed by the agent of defendant's local homestead to assist in keeping the books, make out receipts, notify the agent of members in arrears, and send out notices over the agent's name was not an agent of the defendant company and was therefore not disqualified to testify by Comp. Laws, § 10212, as amended by Pub. Acts 1901, No. 239, and Pub. Acts 1903, No. 30, disqualifying the officers or agents of a corporation from testifying concerning matters equally within the knowledge of a person since deceased.

(For other cases, see Witnesses, Cent. Dig. §§ 576-579; Dec. Dig. § 141.)

2. STIPULATION—ADMISSION OF COUNSEL—APPLICABILITY OF STATUTE.

An admission or concession of counsel as to the applicability of a statute to a matter in controversy is not binding on the courts.

(For other cases, see Stipulation, Cent. Dig. § 2; Dec. Dig. § 3.)

On rehearing. Former opinion withdrawn, judgment reversed, and new trial granted.

For former opinion, see 139 N. W. 2.

* Decision rendered, Nov. 3, 1913. 143 N. W. Rep. 626.

BANKERS' RESERVE LIFE CO. vs. OMBERSON.*

(Supreme Court of Minnesota.)

1. CANCELLATION OF INSTRUMENTS—GROUNDS—ADEQUATE REMEDY AT LAW—INSURANCE POLICY.

An action brought after a loss under an insurance policy to cancel the policy for fraud, or to restrain an action at law thereon, cannot be

* Decision rendered, Oct. 31, 1913. 143 N. W. Rep. 735. Syllabus by the Court.

maintained, in the absence of some special circumstances of a nature to cause irreparable loss to plaintiff if he is relegated to his remedy at law by way of defense to an action on the policy. Where the remedy at law is adequate, equity will not grant relief.

(For other cases, see Cancellation of Instruments, Cent. Dig. § 13; Dec. Dig. § 13.)

2. CANCELLATION OF INSTRUMENTS — COMPLAINT — ADEQUATE REMEDY AT LAW—INSURANCE POLICY.

The complaint in this case pleads no special circumstances of a nature to cause irreparable loss if relief in equity is denied. It shows on its face that plaintiff's remedy at law is speedy, plain, and adequate.

(For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-80; Dec. Dig. § 37.)

3. CANCELLATION OF INSTRUMENTS—GROUNDS—ADEQUATE REMEDY AT LAW,

The facts that the policy contains no limitation of the time in which an action may be brought thereon, and that such an action may be brought at any time before it is barred by statute, do not furnish a presumption of irreparable loss.

(For other cases, see Cancellation of Instruments, Cent. Dig. § 13; Dec. Dig. § 13.)

Appeal from District Court, Murray County; L. S. Nelson, Judge.

Action by the Bankers' Reserve Life Company against Andrew Omberson. From the overruling of a demurrer to the complaint, and the granting of an injunction, defendant appeals. Reversed.

T. E. Diamond, of Sheldon, Iowa, and M. J. Harrington, of Slayton, for Appellant.

B. H. Whitney, of Slayton, Janes, Howard & Janes, of Pipestone, and James H. Adams, of Omaha, Neb., for Respondent.



LAKKA *vs.* MODERN BROTHERHOOD OF AMERICA.*

(Supreme Court of Iowa.)

I. INSURANCE—MUTUAL BENEFIT SOCIETY—ADOPTION OF MEMBER—PRELIMINARY REQUIREMENTS.

Insured having applied for membership in defendant order and passed the medical examination, a benefit certificate was issued September 29, 1911, and sent to the president and secretary of the local lodge, who countersigned the same. Attached to the certificate was a direction that it could not be placed in force after September 30th, and on that date it was presented to the insured, who accepted it and signed the obligation thereof as a member. Some brief ritualistic form was

* Decision rendered, Oct. 23, 1913. 143 N. W. Rep. 513.

performed by the state deputy of the order and the certificate delivered. On the same day record was made on the books of the local lodge, showing insured's adoption and payment of certain dues, and the current assessment and membership fee collected and retained. *Held*, in the absence of fraud, that the conduct of the lodge officers and its record was conclusive of the question of the insured's completed membership, regardless of any failure to comply with the form of adoption in all particulars, and that it would be conclusively presumed that all such preliminary requirements were substantially complied with or waived.

(For other cases, see Insurance, Cent. Dig. §§ 1999-2002; Dec. Dig. § 817.)

2. INSURANCE — APPLICATION — HABITS — INTEMPERANCE — EVIDENCE.

Statements of insured, in an application for membership in a mutual benefit society, that he had never been intemperate in the use of malt or spirituous liquors, but that he drank beer occasionally, were not falsified by evidence that whisky had been seen in his possession, that he had been seen to drink whisky some three years before his death, and that on several occasions he had drank whisky with a witness; the other evidence being overwhelming to the effect that he never used whisky as a beverage, and that his habits were in all respects temperate.

(For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.)

3. INSURANCE — WARRANTIES — CONDITION OF HEALTH — FALSIFICATION.

A warranty, in an application for mutual benefit certificate, that insured was in good health should be construed as limited to his knowledge and belief, and hence a statement in the application that he had never had pleurisy, pneumonia, or heart disease was not falsified by proof that he died from a blood clot in the heart, and that an autopsy disclosed a congested lung and evidence of pleurisy, in the absence of proof that insured knew that he had any of such diseases.

(For other cases, see Insurance, Cent. Dig. §§ 1859-1865; Dec. Dig. § 723.)

Appeal from District Court, Mahaska County; Byron W. Preston, Judge.

C. C. Dowell, of Des Moines, and W. H. Keating, of Oskaloosa, for Appellant.

Dan Davis and McCoy & McCoy, all of Oskaloosa, for Appellees.



**THOMPSON ET AL. vs. NORTHWESTERN MUT. LIFE
INS. CO. ET AL.***
(Supreme Court of Iowa.)

1. INSURANCE—LIFE POLICY—"INSURED"—"ASSURED."

The word "assured" is sometimes used to designate the party procuring the insurance, and the word "insured" to designate the person whose life is covered; but ordinarily the words are synonymous.

(For other cases, see Insurance, Cent. Dig. §§ 316-322; Dec. Dig. § 156.)

(For other definitions, see Words and Phrases, vol. 4, p. 3681; vol. 1, pp. 591, 592.)

* Decision rendered, Oct. 23, 1913. 143 N. W. Rep. 518.

2. INSURANCE—DISTRIBUTION OF PROCEEDS—“HEIR”—“LEGAL HEIRS.”

Code, § 3313, provides that the words “heirs” or “legal heirs,” or their equivalents, used to designate the beneficiaries in any life insurance policy or certificate of membership in any mutual aid or benefit association, where no contrary intention is expressed in the instrument, shall include a surviving husband or wife of the insured, and the share of such survivor in the proceeds of the policy or certificate shall be the same as that provided by law for the distribution of personal property of intestates. *Held*, that such provision is not limited to a policy procured by insured himself, but was applicable as well to a policy procured by insured's first wife payable to her if she outlived him, but in the event she died first to the heirs at law of insured, so that on her dying first insured's second wife was entitled to take as an heir the same interest that she would be entitled to in her husband's personal property if he died intestate.

(For other cases, see Insurance, Cent. Dig. §§ 1472-1474; Dec. Dig. § 589.)

(For other definitions, see Words and Phrases, vol. 4, pp. 3241-3265; vol. 8, pp. 7677, 7678; vol. 5, pp. 4063, 4064.)

3. INSURANCE—PROSPECTIVE OPERATION—HEIR—DETERMINATION.

Code, § 3313, provides that the words “heirs” or “legal heirs” or their equivalents, used to designate the beneficiaries of any life insurance policy, in the absence of a contrary intention, shall include a surviving husband or wife of the insured, who shall receive the same proportion of the proceeds as that provided by law for the distribution of personal property of intestates. *Held*, that, while such section is prospective in operation only, it is nevertheless applicable to a policy issued before its enactment, where the insured died subsequent thereto, since no person can be an heir of another until after the ancestor's death.

(For other cases, see Insurance, Cent. Dig. §§ 1459, 1460, 1466, 1485; Dec. Dig. § 583.)

Appeal from District Court, Jackson County; L. J. Horan, Judge.

Action on an insurance policy resulted in awarding the plaintiffs two-thirds of the indemnity stipulated therein and one-third thereof to the surviving widow of deceased. The plaintiffs appeal. Affirmed.

F. M. Fort, of Clinton, for Appellants.

G. L. Johnson, of Maquoketa, for Appellant C. H. Sanborn.

W. C. Gregory, of Maquoketa, for Appellee Laura M. Sanborn.

F. D. Kelsey, of Maquoketa, for Appellee Insurance Co.

**EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN
vs. HOWLE.***

(Supreme Court of Arkansas.)

1. INSURANCE — FRATERNAL BENEFIT INSURANCE — DEFENSES TO POLICY—VIOLATION OF LAW.

Where the fraternal benefit certificate sued on provided that it should be void if insured died in consequence of an attempted violation of the law, it was error to exclude evidence that insured was killed while violating the law by making an unlawful assault upon the marshal who killed him.

(For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.)

2. EXCEPTIONS, BILL OF—CONTENTS—DOCUMENTS.

Where the benefit certificate sued on was filed as part of the pleadings, and the stenographer's transcript, as incorporated in the bill of exceptions, shows that it was read in evidence, and shows a call directing the clerk to copy it into the bill of exceptions, which was done, the benefit certificate was properly in the appellate record so that it would be considered.

(For other cases, see Exceptions, Bill of, Cent. Dig. §§ 12-15, 19, 29; Dec. Dig. § 22.)

Appeal from Circuit Court, White County; Eugene Lankford, Judge.

Action by Laura O. Howle against the Eminent Household of Columbian Woodmen. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

S. Brundidge, of Searcy, for Appellant.

J. N. Rachels and John E. Miller, both of Searcy, for Appellee.

* Decision rendered, Oct. 13, 1913. 160 S. W. Rep. 238.



**FIDELITY MUT. LIFE INS. CO. OF PHILADELPHIA, PA.
vs. ZAPP.***

(Court of Civil Appeals of Texas. Austin.)

1. INSURANCE—AMOUNT PAYABLE—DEDUCTION OF UNPAID PREMIUMS.

A life insurance policy provided for the payment of annual premiums on or before October 1st in each year for 20 years from October 1, 1895. Insured paid one annual premium, and on October 1, 1896, paid a quarterly premium, carrying the policy to January 1, 1897, at which time he paid an annual premium, receiving a receipt, stating that it paid

* Decision rendered, Oct. 22 1913. 160 S. W. Rep. 139.

his dues up to January 1, 1898. Thereafter and until his death he continued to pay annual premiums each year on or about January 1st. In 1903 the company changed to a legal reserve basis, and sent to insured a certificate to be, and which was, attached to the policy, stating the benefits thereunder on that basis, which certificate stated that the policy years were to be counted from October 1, 1895, and to end October 1, 1915, and that all provisions of the policy inconsistent or in conflict therewith were thereby canceled. Insured died December 20, 1910. The policy provided for the deduction of the balance of the dues for the current year of insured's death. *Held*, that each policy year commenced on October 1st, and not on January 1st, and hence the company was entitled to deduct the balance of the premium for the year ending October 1, 1911, since if any doubt as to the date of the beginning of the policy year was created by the change in the time of paying the premiums, it was removed by the certificate mentioned.

(For other cases, see Insurance, Cent. Dig. §§ 1307, 1308; Dec. Dig. § 523.)

2. INSURANCE—PAYMENT OF LOSS—WAIVER OF OBJECTIONS TO MEDIUM OF TENDER.

Where an insurance company sent to a beneficiary under a policy a check for the amount due, which she retained without objection, except an unfounded objection that it was insufficient in amount, this constituted a sufficient tender, and prevented the recovery of interest.

(For other cases, see Insurance, Cent. Dig. §§ 1495, 1496; Dec. Dig. § 599.)

Error to District Court, Fayette County; Frank S. Roberts, Judge.

Action by Mrs. Isolde Zapp, executrix, against the Fidelity Mutual Life Insurance Company of Philadelphia, Pa. Judgment for plaintiff, and defendant brings error. Affirmed in part, and reversed and rendered in part.

Locke & Locke, of Dallas, for Plaintiff in Error.
C. D. Krause, of La Grange, for Defendant in Error.



PIERCE *vs.* NEW YORK LIFE INS. CO.*

(Kansas City Court of Appeals. Missouri.)

I. INSURANCE — CONSTRUCTION OF POLICY — COMMENCEMENT OF RISK.

While a binding contract of insurance may arise from the acceptance by the company of an application, without a policy being issued thereon, a provision that the contract shall not become effective until the policy is issued and delivered is valid.

(For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.)

* Decision rendered, Oct. 6, 1913. Rehearing denied, Nov. 3, 1913. 160 S. W. Rep. 40.

2. INSURANCE—PROVISIONS OF POLICY—WAIVER BY COMPANY.

Such a provision is one for the benefit of the company which it may waive. (For other cases, see Insurance, Cent. Dig. §§ 75, 253-262; Dec. Dig. § 141.)

3. INSURANCE—COMMENCEMENT OF RISK—DELIVERY OF POLICY—UNAUTHORIZED AGREEMENT BY AGENT.

Where an agent tendered insurance policies to the applicant, who objected to them because of the beneficiary named therein, but, on the advice of the agent, paid the premiums to him under an agreement that he was to retain the money until new policies with another beneficiary were issued and the money returned to her if she did not accept the policies, but insured knew that such an agreement was not binding on the company because of the restrictions upon the agent's authority, and that her right to recover the money would terminate if it were paid to the company by the agent, the agreement was not one by which the applicant reserved the right to reject the policy, but one where she trusted the agent to retain the money.

(For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.)

4. INSURANCE—PROVISIONS OF POLICY—COMMENCEMENT OF RISK—WAIVER.

Where the company thereafter changed the plan proposed by the agent, and instead of canceling the former policies decided to have the beneficiary changed therein, and the insured signed an application to that effect, the company elected to treat the contract as in force, and could not after the death of insured take the opposite position.

(For other cases, see Insurance, Cent. Dig. §§ 75, 253-262; Dec. Dig. § 141.)

5. INSURANCE—CHANGE OF BENEFICIARY—INDORSEMENT ON POLICY.

The fact that insured died before the change of the beneficiaries was indorsed on the policy did not defeat the right of the new beneficiary under the clause of the policy that the change should not become effective until it was indorsed on the policy; since under the circumstances the former beneficiaries had acquired no vested interest therein.

(For other cases, see Insurance, Cent. Dig. § 1470; Dec. Dig. § 586.)

Appeal from Circuit Court, Atchison County; William C. Ellison, Judge.

Action by Sallie D. Pierce, by her guardian, against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Culver, Phillip & Spencer, of St. Joseph, for Appellant.
Hunt, Bailey & Hunt, of Rock Port, for Respondent.

ROEDEL vs. JOHN HANCOCK MUT. LIFE INS. CO.*
 (St. Louis Court of Appeals. Missouri.)

1. INSURANCE—LIFE INSURANCE—BURDEN OF PROOF—EXISTING ILLNESS.

The burden was on a life insurance company to show that insured was ill from a progressive disease, when he took out the policy sued on and stated in his application that he was in good health.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.)

2. INSURANCE—LIFE INSURANCE—MISREPRESENTATIONS—EFFECT ON POLICY.

Under Rev. St. 1909, § 6937, providing that no misrepresentations made in obtaining a life policy shall render the policy void unless the matter misrepresented actually contributed to the event on which the policy became payable, a misrepresentation in the application that insured was then in good health would not avoid the policy, unless he was then suffering from an infirmity which actually contributed to his death.

(For other cases, see Insurance, Cent. Dig. §§ 681-690, 694-696; Dec. Dig. § 291.)

3. INSURANCE — LIFE INSURANCE — ACTIONS — JURY QUESTION.

Under Rev. St. 1909, § 6937, providing that no misrepresentation in securing a life policy shall render the policy void unless the matter misrepresented actually contributed to the event on which the policy was to become payable, "and whether it so contributed in any case shall be a question for the jury," the question whether the matter misrepresented contributed to the event is a question for the jury in every case irrespective of the condition of the evidence thereon.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

4. INSURANCE — LIFE INSURANCE — ACTIONS — JURY QUESTION.

Evidence in an action on a life policy, held to make it a jury question whether insured was in good health as represented in his application at the time the policy was issued.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

5. APPEAL AND ERROR—REVIEW—CONFLICTING EVIDENCE.
 The appellate court will not review a finding of fact made on conflicting evidence.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.)

6. INSURANCE—LIFE INSURANCE—INSTRUCTIONS—MISREPRESENTATIONS.

An instruction that, to avoid a policy for a misrepresentation in the application that insured was in good health, any representation in procuring the insurance must not only have been with respect to a matter which contributed to the event on which the policy was to become

* Decision rendered, July 16, 1913. Rehearing denied, Nov. 4, 1913. 160 S. W. Rep. 44.

payable, but must have been made with knowledge of its falsity, was not erroneous to defendant's prejudice.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1771-1784; Dec. Dig. § 669.)

7. INSURANCE—LIFE INSURANCE—WARRANTIES.

Answers by insured, in his application for a life policy, that he was then in good health, etc., were not warranties, but were representations.

(For other cases, see Insurance, Cent. Dig. § 560; Dec. Dig. § 265.)

8. APPEAL AND ERROR — REVIEW — REFUSAL OF INSTRUCTIONS.

Alleged error in refusing instructions cannot be reviewed, where the question was not raised in appellant's motion for new trial.

(For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1752; Dec. Dig. § 302.)

Appeal from St. Louis Circuit Court; George H. Shields, Judge.

Action by Catherine Roedel against the John Hancock Mutual Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Leahy, Saunders & Barth and Block & Sullivan, all of St. Louis, for Appellant.

H. A. Loevy and Bland & Cave, all of St. Louis, for Respondent.



GAGE *vs.* DETTLING.*

(Supreme Court of New York, Special Term, Erie County.)

INSURANCE—MUTUAL BENEFIT INSURANCE—FORFEITURE FOR NONPAYMENT—REINSTATEMENT.

The by-laws of a lodge provided that no member who was in debt for more than 13 weeks' dues when taken sick should be entitled to sick benefits nor his family death benefits, and that a member who was three months in arrears for dues should not become a beneficiary until six weeks after such arrearages have been paid in full, and then only on furnishing satisfactory proof to the lodge that he was in good health at the time the payments were made. The dues were payable quarterly, and plaintiff's husband did not make the payment due September 30th until November 25th, on which date it was received by the lodge. The member's last sickness began on November 28th, and he died on January 4th following. Held, that under the by-laws the widow was entitled to death benefits; since a delay in paying the dues of less than three months did not forfeit the rights of the member to continue the insurance, but only required him to carry his own

* Decision rendered, October 31, 1913. 143 N. Y. Supp. 767.

insurance for the time he was delinquent and for any sickness contracted during that time.

(For other cases, see Insurance, Cent. Dig. §§ 1895, 1896, 1903; Dec. Dig. § 750.)

Appeal from City Court of Buffalo.

Action by Helen B. Gage against Paul Dettling. From a judgment of the City Court of Buffalo in favor of the plaintiff, the defendant appeals. Affirmed.

Calvin S. Crosser, of Buffalo, for Appellant.

James A. Magoffin, of Buffalo, for Respondent.



ROANE *vs.* UNION PAC. LIFE INS. CO.*

(Supreme Court of Oregon.)

1. COMPROMISE AND SETTLEMENT—VALIDITY.

A compromise and settlement of a claim asserted on reasonable grounds and in good faith, which the parties, having equal knowledge of the facts, consider doubtful, constitutes a new and valid agreement, which is enforceable, though the matter compromised be not in fact doubtful in legal contemplation, and the settlement be not what a court would have adjudged on the facts involved.

(For other cases, see Compromise and Settlement, Cent. Dig. §§ 17-31, 33; Dec. Dig. § 8.)

2. INSURANCE—CLAIM—COMPROMISE AND SETTLEMENT—VALIDITY.

Plaintiff's husband, since deceased, held a policy for \$5,000 in a New York insurance company, on which he had paid the first premium when the company failed. The A. company was incorporated to take over the risks, and solicited plaintiff's husband to apply for a policy for the same amount in it. This he did. His application was accepted, and he gave his note to the company for the first annual premium. Thereafter defendant was organized, and took over all the assets and business of the A. company and assumed its liabilities. The premium note was turned over to defendant and by it collected before decedent's death. He died before receiving the policy from defendant, and, plaintiff having made a claim which was disputed, an agreement was entered into that she should receive \$2,750, for which defendant's agent executed defendant's demand note. Held, that such agreement was a valid compromise and settlement, so as to form a sufficient consideration for the note.

(For other cases, see Insurance, Cent. Dig. §§ 1417, 1419; Dec. Dig. § 579.)

3. INSURANCE—AUTHORITY OF AGENT—QUESTION FOR JURY.

In an action on a note executed by the agent of an insurance company in compromise of a claim, he having authority to effect a settlement, and

* Decision rendered, Oct. 21, 1913. 135 Pac. Rep. 892.

having informed plaintiff that he was authorized to execute the note, and having done so and received a release which defendant, on repudiating the agent's authority, did not offer to return, whether the agent had such authority was for the jury.

(For other cases, see Insurance, Cent. Dig. §§ 1417, 1419; Dec. Dig. § 579.)

4. INSURANCE—AUTHORITY OF AGENT—RATIFICATION.

Where an agent of an insurance company authorized to effect a settlement of a claim, executed a note on defendant's behalf for the amount of the settlement and received from plaintiff a release of such claim, which defendant, though repudiating the settlement, refused to return until five or six months after knowledge of the compromise, it thereby ratified the compromise.

(For other cases, see Insurance, Cent. Dig. § 1412; Dec. Dig. § 565.)

5. INSURANCE—OPERATION OF COMPANY—STATE LICENSE—STATUTES—APPLICATION—CONTRACTS.

L. O. L. § 4609, providing that no insurance company shall transact a life insurance business in Oregon without a certificate from the State Insurance Commissioner authorizing the same, had no application to the note of a domestic insurance company executed in Washington in settlement of a claim.)

(For other cases, see Insurance, Cent. Dig. § 5; Dec. Dig. § 5.)

6. INSURANCE—COMPANIES DOING BUSINESS IN STATE—LICENSE—FAILURE TO OBTAIN—CONTRACTS.

L. O. L. § 4609, prohibits insurance companies from doing business in Oregon without a license, and section 4646 provides a fine of from \$100 to \$500 for a violation of the insurance law by an officer, agent, or employee of any insurance company. Held, that such provisions applied only to officers, agents, and employees of insurance companies, and did not invalidate policies issued or contracts made by insurance companies within the state before receiving a license.

(For other cases, see Insurance, Cent. Dig. § 5; Dec. Dig. § 5.)

7. CORPORATIONS—CONTRACTS—POWER—ESTOPPEL.

Where a corporation has executed a contract in excess of its granted powers, and has received the benefits thereof, it is estopped to deny its power to make it in an action brought to enforce the same.

(For other cases, see Corporations, Cent. Dig. §§ 1556-1567; Dec. Dig. § 388.)

Department 1. Appeal from Circuit Court, Multnomah County; Geo. N. Davis, Judge.

Action by Eva L. Roane against the Union Pacific Life Insurance Company. Judgment for defendant, and plaintiff appeals. Reversed and new trial ordered.

This is an action upon a promissory note, which the plaintiff alleges was executed by the defendant for \$2,750. A judgment of nonsuit was entered against the plaintiff in the court below. The plaintiff appeals. The facts appear in the opinion of the court.

Thos. G. Greene, of Portland (Bauer & Greene and A. H. McCurtain, all of Portland, on the brief), for Appellant.

Guy C. H. Corliss, of Portland (Corliss & Skulason, of Portland, on the brief), for Respondent.

HARPER ET AL. *vs.* FLATT.*

(Court of Appeals of Kentucky.)

TRUSTS—EXISTENCE—MUTUAL BENEFIT INSURANCE—EVIDENCE.

In an action by creditors of a policyholder to have it adjudged that the beneficiary held the proceeds of the policy as trustee for the creditors, evidence *held* to show that insured took out the policy for the benefit of the beneficiary and not for the benefit of the creditors.

(For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. § 44.)

Appeal from Circuit Court, Hickman County.

Action by J. L. Harper and others against Frank P. Flatt. From a judgment dismissing the petition, plaintiffs appeal. Affirmed.

Bennett, Robbins & Thomas, of Clinton, for Appellants.
R. B. Flatt and R. L. Smith, both of Clinton, for Appellee.

* Decision rendered, Nov. 12, 1913. 160 S. W. Rep. 241.

GRAND CAMP OF COLORED WOODMEN OF ARKANSAS ET AL. *vs.* JOHNSON.*

(Supreme Court of Arkansas.)

I. INSURANCE—MUTUAL BENEFIT INSURANCE—ACTIONS—COMPLAINT.

Under Kirby's Dig. § 4354, requiring fraternal insurance orders to give a bond conditioned for the prompt payment of all moneys coming into the hands of its officers to which beneficiaries are entitled, in an action on a bond conditioned in the language of the statute, a complaint alleging that the company had failed and refused to pay a beneficiary's claim except a partial payment, and that there was due and unpaid a specified sum, failed to show any breach of the bond, and was

* Decision rendered, Oct. 20, 1913. 160 S. W. Rep. 400.

insufficient as against the sureties, since their liability was fixed by the terms of the bond, and depended upon a breach of the condition.

(For other cases, see Insurance, Cent. Dig. §§ 1996-1998; Dec. Dig. § 815.)

2. PLEADING—DEMURRER—SCOPE.

Where a complaint is assailed by general demurrer, the question is whether it entitles plaintiff to any relief.

(For other cases, see Pleading, Cent. Dig. §§ 409, 412, 416-418; Dec. Dig. § 216.)

Appeal from Circuit Court, Woodruff County; J. S. Thomas, Special Judge.

Action by Fed Johnson against the Grand Camp of Colored Woodmen of Arkansas and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Carmichael, Brooks, Powers & Rector, and Scipio A. Jones, all of Little Rock, for Appellants.

Harry M. Woods, of Augusta, for Appellee.



MARCUS vs. HERALDS OF LIBERTY.*

(Supreme Court of Pennsylvania.)

1. INSURANCE—CERTIFICATE OF MEMBERSHIP—"INSURANCE POLICY"—EVIDENCE.

A certificate of membership in a beneficial association is not an "insurable policy" within Act of May 11, 1881 (P. L. 20), making by-laws, which are referred to in an insurance policy as a part thereof inadmissible in evidence unless attached to the policy.

(For other cases, see Insurance, Cent. Dig. § 1854; Dec. Dig. § 718.)

(For other definitions, see Words and Phrases, vol. 6, pp. 5440-5442.)

2. INSURANCE—ACTION ON POLICY—DEFENSES—SUICIDE.

An insurance policy which contains no stipulation as to suicide is not avoided as to the beneficiary, the insured's wife, where the insured commits suicide.

(For other cases, see Insurance, Cent. Dig. § 1956; Dec. Dig. § 788.)

3. INSURANCE—MUTUAL ASSOCIATIONS—CHARACTER OF BUSINESS—DETERMINATION—WHAT LAW GOVERNS.

Whether the character of the business transacted in Pennsylvania by an Alabama beneficial association is an insurance business will be determined by the law of Pennsylvania when the subject of judicial inquiry therein.

(For other cases, see Insurance, Cent. Dig. § 1824; Dec. Dig. § 687.)

* Decision rendered, June 27, 1913. 88 Atl. Rep. 678.

4. INSURANCE—MUTUAL ASSOCIATIONS—PRESUMPTION OF NATURE OF BUSINESS—EVIDENCE.

The presumption that the business transacted in Pennsylvania by an Alabama beneficial association is what the association declares it to be and not an insurance business may be overcome by the evidence.

(For other cases, see *Insurance*, Cent. Dig. §§ 1999-2002; Dec. Dig. § 817.)

5. INSURANCE—NATURE OF BUSINESS—SUFFICIENCY OF EVIDENCE.

Evidence, in a beneficiary's action for insurance, *held* to show that the business transacted by the defendant, an Alabama corporation, in Pennsylvania was that of life insurance; and hence, under the express provisions of Act May 11, 1881 (P. L. 20), failure to attach its by-laws to the certificate sued on defeated its right to set up the defense of suicide, which was not provided for in the certificate except by reference to the by-laws.

(For other cases, see *Insurance*, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.)

Appeal from Court of Common Pleas, Philadelphia County.

Action by Yetta Marcus against the Heralds of Liberty, a corporation, etc. From judgment for defendant n. o. v., plaintiff appeals. Reversed.

From the record it appeared that Herman D. Marcus held five membership certificates in the Heralds of Liberty, an Alabama corporation, under each of which there was payable \$500 at his death to his wife, Yetta Marcus, the plaintiff. Each certificate contained this printed clause: "This certificate is issued to and accepted by the holder hereof, subject to the laws, rules and regulations of this society, which are hereby referred to and made a part of this contract." The laws, rules, and regulations of the society provided: "Section 88. No benefits shall be paid on account of death * * * from suicide whether sane, or insane. * * *" This clause was not printed on the certificates.

On June 16, 1910, Herman D. Marcus committed suicide by taking poison. Other facts appear by the opinion of the Supreme Court. Verdict for plaintiff for \$2,750. The court subsequently entered judgment for defendant n. o. v.

Argued before Fell, C. J., and Potter, Elkin, Stewart, and Moschzisker, JJ.

Paxson Deeter, Samuel W. Salus, and John C. Bell, all of Philadelphia, for Appellant.

George J. Edwards, Jr., of Philadelphia, for Appellee.

BASS VS. OCCIDENTAL LIFE INS. CO.*

(Supreme Court of New Mexico.)

1. APPEAL AND ERROR—WHÓ MAY APPEAL—PARTIES AGRIEVED.

Section 1, c. 57, S. L. 1907, gives to "any person aggrieved by any final judgment," etc., the right of appeal. Under this statute, the right of appeal is not confined to a party to the suit; but any person directly interested and injuriously affected by the judgment may appeal.

(For other cases, see Appeal and Error, Cent. Dig. §§ 934-946; Dec. Dig. § 150.)

2. APPEAL AND ERROR—APPLICATION BY ONE NOT A PARTY—SUFFICIENCY.

All the facts entitling the person, not a party to the record, to appeal, should be stated in the application for appeal.

(For other cases, see Appeal and Error, Cent. Dig. §§ 1941-1959; Dec. Dig. § 361.)

Appeal from District Court, McKinley County, Raynolds, Judge.

Action by Edward Bass, administrator of C. Gordon Bass, against the Occidental Life Insurance Company. Judgment for defendant, and Susie Bass, administratrix de bonis non, appeals. Dismissed.

A. T. Hannett, of Gallup, and Vigil & Jamison, of Albuquerque, for Appellant.

A. B. McMillen, of Albuquerque, for Appellee.

* Decision rendered, Oct. 21, 1913. 135 Pac. Rep. 1175. Syllabus by the Court.

**BOECK ET AL. VS. MODERN WOODMEN OF AMERICA.***

(Supreme Court of Iowa.)

1. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—FORM.

Assignments of error that are so general in their terms as not to direct the Supreme Court to the particular errors relied on will not be reviewed.

(For other cases, see Appeal and Error, Cent. Dig. §§ 2997-3001, 3022; Dec. Dig. § 724.)

2. INSURANCE—MUTUAL BENEFIT SOCIETIES—BY-LAWS.

Insured by his application and acceptance of his certificate of insurance in a mutual benefit association became a member and was bound by its by-laws, including one that if he should become intemperate in

* Decision rendered, Nov. 17, 1913. 143 N. W. Rep. 999.

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the use of intoxicating liquors, drugs, or narcotics, or if his death should result directly or indirectly from such use, the certificate should be void.

(For other cases, see Insurance, Cent. Dig. § 1854; Dec. Dig. § 718.)

3. INSURANCE — MUTUAL BENEFIT SOCIETIES — CERTIFICATE—ACTION—DEFENSES—CAUSE OF DEATH—USE OF INTOXICANTS.

In an action on a mutual benefit certificate, evidence *held* to establish as a matter of law that decedent's death resulted from the intemperate use of intoxicating liquors, within a provision of the society's by-laws that if death resulted from such cause the certificate should be void and all payments made thereon forfeited to the society.

(For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.)

4. INSURANCE—BENEFIT CERTIFICATES—ACTION—CAUSE OF DEATH—EVIDENCE—CORONER'S VERDICT.

In an action on a benefit certificate, the result of a coroner's inquest was admissible as *prima facie* evidence of the fact that death resulted from the cause found by the coroner's jury.

(For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.)

Appeal from District Court, Floyd County; C. H. Kelley, Judge.

Action at law on an insurance benefit certificate. From a verdict and judgment for plaintiffs, this appeal is taken. Reversed.

Truman Plantz and Geo. G. Perrin, both of Rock Island, Ill., and J. C. Campbell, of Charles City, for Appellant.

Ellis & Ellis, of Charles City, for Appellees.



BUCHHOLZ *vs.* METROPOLITAN LIFE INS. CO.*

(St. Louis Court of Appeals. Missouri.)

1. INSURANCE—LIFE INSURANCE—ACTIONS—JURY QUESTION.

In an action on a life policy, where the statements of the medical examiner were in conflict with those of the physician who furnished the proofs of death, the question is for the jury.

(For other cases see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

2. TRIAL—JURY QUESTION.

Even though the evidence in an action is uncontradicted, the question of its credibility is for the jury.

(For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.)

* Decision rendered, Nov. 4, 1913. 160 S. W. Rep. 573.

**3. APPEAL AND ERROR—PERSONS ENTITLED TO ALLEGE
ERROR.**

In an action on a life policy, where the instructions directed a verdict for the insurer in case the insured in his application falsely represented that he was not subject to disease of the heart or kidneys, it is immaterial to the insurer whether insured's statements were warranties or representations.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224 Dec. Dig. § 1064.)

4. APPEAL AND ERROR—REVIEW—HARMLESS ERROR.

In an action on a life policy, where the beneficiary sought under Rev. St. 1909, § 7068, damages for the insurer's vexatious delay in payment, the failure of the jury to separate the various items of the verdict is not reversible error.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4231-4233; Dec. Dig. § 1070.)

5. APPEAL AND ERROR—REVIEW—VERDICTS.

A verdict which is the result of passion or prejudice will not be sustained on appeal.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3921, 3923, 3924; Dec. Dig. § 999.)

6. INSURANCE—LIFE POLICIES—ACTION.

In an action on a life policy, where insurer vexatiously refused to satisfy the policy, an award of \$100 attorney's fees does not show passion or prejudice on the part of the jury, where there was testimony authorizing such an award, even though the amount of the policy was less than \$100.

(For other cases, see Insurance, Cent. Dig. § 1498; Dec. Dig. § 602.)

7. INSURANCE—LIFE POLICIES—REFUSAL TO PAY.

Where an insurer vexatiously refuses to satisfy a life policy, an award of 10 per cent damages in favor of the beneficiary is authorized by Rev. St. 1909, § 7068, as amended by Acts 1911, p. 282.

(For other cases, see Insurance, Cent. Dig. § 1498; Dec. Dig. § 602.)

Appeal from St. Louis Circuit Court; W. E. Homer, Judge.
Action by Louise Buchholz against the Metropolitan Life Insurance Company. From a judgment for plaintiff in the justice court, defendant appealed to the circuit court, from whence it again appeals from an adverse judgment. Affirmed.

Nathan Frank and M. W. Oliver, both of St. Louis, for Appellant.

James J. O'Donohoe, of St. Louis, for Respondent.

FIRE, TORNADO, ETC.**SUPREME COURT OF MISSISSIPPI.**

PENIX

vs.

AMERICAN CENT. INS. CO. (No. 16,068.)*

1. INSURANCE—FIRE INSURANCE—"INVENTORY."

A list of the goods, showing their values, which were first placed in insured's store, which was made by assured and treated as an inventory, was an "inventory" within the meaning of a fire insurance policy requiring insured to take a complete itemized inventory of the stock on hand.

(For other cases, see Insurance, Cent. Dig. §§ 852, 853; Dec. Dig. § 335.)

(For other definitions, see Words and Phrases, vol. 4, pp. 3754, 3755.)

2. INSURANCE — FIRE INSURANCE — IRON-SAFE CLAUSE — "KEEP A SET OF BOOKS."

An iron-safe clause in a fire policy, which required assured to keep a set of books which shall clearly present a complete record of business transacted, including purchases, sales, and shipments, was sufficiently complied with by keeping a set of books which would enable an accountant to ascertain from them and the inventory kept, the value of the goods on hand at the time of the fire; and, while the provision "keep a set of books" implied that the entries should be made near the time the transactions occurred, it was not necessary for assured to post his ledger each day if he posted the gross amount of cash sales for the periods between the dates of posting the ledger, though, if he did so, the books containing the items posted to the ledger in gross, should have been preserved.

(For other cases, see Insurance, Cent. Dig. §§ 852, 853; Dec. Dig. § 335.)

3. INSURANCE—FIRE INSURANCE—IRON-SAFE CLAUSE—TIME OF FIRE—"ACTUALLY OPEN FOR BUSINESS."

A retail store was not "actually open for business" within the meaning of an iron-safe clause requiring the books to be kept in an iron safe at all times when the building was not actually open for business, during the time the store was closed and the doors locked and the proprietor was in another part of the city, so that business could not be done while he was away.

(For other cases, see Insurance, Cent. Dig. §§ 852, 853; Dec. Dig. § 335.)

(For other definitions, see Words and Phrases, vol. 1, p. 173.)

4. INSURANCE — FIRE INSURANCE — IRON-SAFE CLAUSE — COMPLIANCE.

There was no compliance with an iron-safe clause in a fire policy requiring the books to be kept in a place not exposed to a fire, which would destroy the building, where the books were kept under the proprietor's pillow at night.

(For other cases, see Insurance, Cent. Dig. §§ 852, 853; Dec. Dig. § 335.)

* Decision rendered, Nov. 24, 1913. 63 South. Rep. 346.

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Action by J. H. Penix, trustee, against the American Central Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Appellant was plaintiff in the court below, and appellee was defendant. Suit was brought to recover on an insurance policy covering a stock of goods destroyed by fire. The defense of the insurance company was that the insured had failed to comply with the iron-safe clause of the policy, which is as follows:—

“Iron-Safe Clause.

“1st. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of the issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned.

“2d. The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory as provided for in first section of this clause, and during the continuance of this policy.

“3d. The assured will keep such books and inventories—and also the last preceding inventory, if such has been taken—securely locked in a fireproof safe at night, and at all times when the building mentioned in this policy is not actually open for business; or, failing in this, the assured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building.

“In the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon.”

Watkins & Watkins, of Jackson, for Appellant.

McLaurin, Armistead & Brien, of Vicksburg, for Appellee.

SMITH, C. J.

Appellant is the trustee in bankruptcy for the estate of A. H. Borah, a bankrupt. Among the assets of this estate was the insurance policy sued on, covering a stock of goods formerly owned by the bankrupt, and which had been destroyed by fire during the life of the policy. The insurance company having declined to pay for the loss of the goods, this suit was instituted. At the close of the evidence a peremptory instruction was given for the defendant, and there was a verdict and judgment ac-

cordingly. The ground of this peremptory instruction was the failure of the assured to comply with the iron-safe clause contained in the policy, which clause the reporter will set out in full.

Prior to the month of June, 1911, Borah was conducting a general merchandise business at Silver City, Miss. About this time he decided to open a similar business in the city of Greenwood, and thereupon shipped to Greenwood from his Silver City store, certain goods, wares, and merchandise, with which, together with some other goods purchased from various wholesale merchants, he commenced business on the 26th of June, 1911. The policy sued on was executed on August 8th, and the fire which destroyed the stock of goods occurred on August 15th. When the goods shipped from Silver City were packed preparatory to shipment a complete inventory thereof was made by Borah, and when they were received at Greenwood they were checked into the store from this inventory; they being at that time the only goods in the house. Afterwards, and before the store opened for business, other goods were purchased from various wholesale merchants; invoices thereof being by these merchants delivered to Borah and the goods checked into the house from these invoices. This inventory and these invoices were kept by Borah in an iron safe at a place other than the store, and were produced at the trial. His set of books consisted of a small ledger containing several accounts; the only one having any real tendency to show the amount and value of the goods that went into and out of the store being his merchandise account. This account contains, on the debit side thereof, footings of the inventory and invoices of the goods received, together with the names of the parties from whom purchased, and on the credit side the following items:—

1911.	Cr.
June 26, by cash acc. C. S.	\$ 3 00
" " S. C. goods to S. C.	129 91
27, " cash C. S.	4 00
30, " " C. S. from 28—30....	5 00
July 3, " C. S. from 1—3	4 50
8, " " " 4—8	13 00
30, " " "	105 00
Aug. 9, " " to Aug. 9	76 00
18, " Carruthers Jones Shoe Co.	81 70

Borah did not stay in this store himself, but it was managed and the business conducted by a clerk by the name of Lyell, who made all of the sales and sold only for cash. Lyell kept a memorandum book on which he entered each day the gross amount of cash sales for the day and whatever goods he took out for his own use. He kept no memorandum of the items composing these cash sales. Borah, at intervals, as shown by the

credit side of the merchandise account, would post these cash sales in his ledger, transferring thereto, not each item, or rather, the amount of each day's sales separately, but the aggregate amount thereof, in one item, for the time elapsing since he last posted the account. This book was last posted on August 9th. Lyell slept and cooked his meal in the rear of the store, and this memorandum book in which he entered the amount of the daily cash sales was not kept at night in a fireproof safe, or in a "place not exposed to a fire which would destroy the aforesaid building," but was kept by Lyell under his pillow when he retired to sleep. The fire occurred just after 6 o'clock in the evening. A short time prior thereto, Lyell lighted an oil stove on which he cooked his meals and placed on it some food which he desired to cook for his supper. He then closed, locked, and left the store, went to a barber shop about four blocks away, and was there shaved. He then went to a nearby baker shop, purchased a loaf of bread, and returned to the store, being absent altogether, according to his testimony, "forty or fifty minutes; maybe longer." Just before he arrived at the store on his return his attention was called to the fact that it was on fire; and when he arrived he says that the fire was under such headway that he could do nothing to stop it. He had left this memorandum book, in which the daily record of the business was kept, in the store, and it was burned. There was testimony showing that the store was open and sales made after the 9th day of August, the last day on which the merchandise account was posted, up to and including the day of the fire. Lyell stated that when he closed the store he had not closed it for the night, but intended to reopen it on his return, and, as his custom was, to keep it open for business until 10 or 11 o'clock.

Appellant's contentions are: (1) That under the terms of the policy Borah was not required to keep a set of books until he had made an inventory of the goods in the store; that he had made no such inventory, and under the policy had thirty days in which to do so, which thirty days had not elapsed at the time of the fire; (2) if mistaken in this, that Borah substantially complied with that requirement of the policy by keeping the book containing his merchandise account, which account contains a complete record of the goods bought and sold except for the last several days before the fire, which was too short a time, in proportion to the full time Borah had been in business, to be material; (3) if mistaken in this, that the book just referred to, together with the memorandum book kept by Lyell, did constitute a substantial compliance with this requirement, and that the policy was not violated by the last-named book being in the store and not in a fireproof safe, or some place not exposed to a fire which would destroy the building at the time of the fire, for the reason that when the fire occurred the store was actually open for business within the meaning of the policy.

In support of his first proposition appellant's counsel say that the inventory made by Borah of the goods shipped from Silver City to Greenwood was simply an invoice, and not an inventory within the meaning of the policy; and in support thereof we are referred to the case of Insurance Co. vs. Bank, 71 Miss. 612, 15 South. 932. In that case the paper claimed to be an inventory was an invoice of the goods sold which had been checked with the goods by the purchaser prior to, or at the time, of his purchase, and before they were put into the store where the business was conducted.

[1] The paper here in question is not an invoice furnished by a seller to a purchaser, but is a list of the goods, together with their values, which first went into the store, and therefore a list of all then on hand, made by the assured himself, treated by him as an inventory, and preserved and introduced on the trial as such. It complies with all of the requirements of, and must be held to be, an inventory. Phoenix Insurance Co. vs. Dorsey, 58 South. 778.

[2] In order that this iron-safe clause may be complied with it is only necessary that the assured keep such a set of books as will enable an accountant to ascertain from them, together with the inventory, with reasonable accuracy, the value of the goods on hand at the time of the fire. The requirement to "keep a set of books," etc., however, *ex vi termini*, implies that the entries therein shall be at or near the time the transactions entered occurred. The requirement is that a record of the business be *kept* complete; not made complete for the time being at stated or irregular intervals by the recording of transactions long past.

It was, of course, not necessary for the assured to have posted his ledger each day, and, if he desired, he had the right to post only the gross amount of the cash sales for the interval between the dates of posting; but if he desired to pursue this plan, he should have preserved the book containing the items which were posted to the ledger in gross. The preservation of the book kept by Lyell was therefore necessary in order that this clause of the policy might be complied with, conceding, for the purpose of argument, that the book introduced complied therewith in all other respects. If the keeping of this ledger alone in the manner in which it was kept should be held to constitute a compliance with the iron-safe clause, it would logically follow that the clause could be complied with by a merchandise account containing only two entries—one a debit of the gross amount of merchandise put into the store, and the other a credit of the gross amount taken out of it.

[3, 4] There is no merit in the contention of counsel for appellant that at the time the store was burned in was actually open for business within the meaning of the policy. The physical fact is that it was closed, the doors locked, and Lyell had gone to another portion of the city, so that it was physically impossible for

any business to have been transacted within the store while he was away. It may be that a temporary absence from the store of all persons in charge thereof may be of such a character as not to violate this clause of the policy, as was held in *Jones vs. Southern Insurance Co. (C. C.)* 38 Fed. 19, as to which we express no opinion; but such is not the case here. *Joffe et al. vs. Niagara Fire Insurance Co.*, 116 Md. 155, 81 Atl. 281, Ann. Cas. 1913C, 1217. Lyell not only closed and locked the store, but deliberately left the immediate vicinity thereof, and was so situated for the time being that it was impossible for him to preserve the books when the store burned; and, moreover, neither he nor Borah had in the past, so far as this memorandum book is concerned, complied with the third paragraph of this clause; and there is no indication in the evidence that they had any intention of doing so at the time of the fire or thereafter. It had never been kept, when the store was closed, "in a place not exposed to a fire which would destroy the * * * building," but had always been placed at night when the store was closed, not in a fireproof safe, but under Lyell's pillow—a place, of course, exposed to a fire which would destroy the building; that Lyell was nearby, and might have been able to save the book in the event of a fire, is immaterial, for that is not the protection intended to be secured to the insurance company by the clause in question.

Affirmed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.**BRISTOL.****VERA ET AL.****vs.****MERCANTILE FIRE & MARINE INS. CO.****VERA****vs.****MERRIMACK MUT. FIRE INS. CO.****VERA ET AL.****vs.****MICHIGAN FIRE & MARINE INS. CO.*****I. SUBMISSION OF CONTROVERSY—STATEMENT OF FACTS—CONSTRUCTION.**

Where a cause was submitted on an agreed statement of facts, which contained no agreement permitting inferences of fact to be drawn, but

* Decision rendered, Nov. 25, 1913. 103 N. E. Rep. 292.

on the contrary showed a stipulation that, unless the facts showed that defendant insurer as a matter of law waived compliance with the provisions of the policy providing for arbitration and award, judgment should be for defendant, the court could not draw inferences from the facts stipulated.

(For other cases, see *Submission of Controversy*, Cent. Dig. §§ 13, 14; Dec. Dig. § 13.)

2. INSURANCE — FIRE INSURANCE — WAIVER OF ARBITRATION.

The standard fire policy prescribed by Rev. Laws, c. 118, § 60, provides that in case of a failure of the parties to agree the amount of loss shall be determined by referees, and unless such reference be waived it shall be a condition precedent to an action on the policy. The statute further declares that in case of loss, and the failure of the parties to agree as to the amount, the insurance company shall, within ten days after written request, appoint referees for arbitration. *Held* that, upon failure of the parties to agree as to the loss, the neglect of the insurer to appoint referees, after receiving the insured's letter stating that he was ready to proceed under the provisions of the policy, did not establish a waiver of the right to reference.

(For other cases, see *Insurance*, Cent. Dig. §§ 1436-1438; Dec. Dig. § 576.)

Report from Superior Court, Bristol County; Hugo A. Dubuque, Judge.

Actions by Frank Vera and others against the Mercantile Fire & Marine Insurance Company and against the Michigan Fire & Marine Insurance Company, and by Frank Vera against the Merrimack Mutual Fire Insurance Company. On report. Judgment for defendants.

J. F. Kiernan, of Wareham, for Plaintiffs.

F. W. Brown and Walter L. Came, both of Boston, for Defendants.

DE COURCY, J.

[1, 2] These cases were submitted to the superior court on an agreed statement of facts and are here on the report of the trial judge for our determination. The amount of the loss or damage by fire never has been agreed upon by the parties, nor determined by referees or otherwise, and neither party has submitted to the other any nominees from whom to select referees. The agreed statement not only contains no stipulation that the trial or appellate court may draw legitimate inferences of fact, but expressly provides that "unless upon the foregoing facts the defendant must be held as matter of law to have waived compliance on the part of the plaintiffs with the provisions contained in said policy, and contained in the statutes in such case made and provided relative to arbitration and award, and to have waived such arbitration and award, judgment shall be entered for the defendant." See *Cunningham vs. Connecticut Fire Ins. Co.*, 200 Mass. 333, 86 N. E. 787. The policies were in the Massachusetts standard form prescribed by our statute. Rev. Laws, c. 118, § 60.

In case of a failure of the parties to agree as to the amount of loss, it was to be determined by referees chosen in the manner provided; and by the terms of the policy "such reference unless waived by the parties shall be a condition precedent to any right of action in law or equity to recover for such loss."

Within the narrow compass of the agreed facts, on which the parties have submitted their rights, we find nothing to warrant a ruling that the defendants must be held as matter of law to have waived their rights to a reference. Indeed the only fact mentioned that could be presented to a jury on the issue of waiver is the failure of the defendants to nominate referees after the receipt by them of the written statements of loss rendered by the plaintiffs. Each of these writings concluded with the declaration that the assured were "ready to proceed under the provisions of the policy." We have before us no evidence of correspondence or of dealings between the parties by which to interpret what the plaintiffs meant, much less what the defendants reasonably should understand, by this indefinite statement; and the parties have precluded us from drawing inferences. A plausible construction of the words, considering the natural sequence of events under the terms of the policies, would be that the plaintiffs were ready to attempt to agree as to the amount of the loss. It does not purport to be a written request for the appointment of referees under the provisions for arbitration in the policy. Clearly we cannot say that the defendants necessarily knew from these words that the plaintiffs intended (if they did intend) to request the appointment of referees; much less must we infer from the failure of the defendants then to appoint referees that they intended to abandon their legal rights to an arbitration. It is only in case of the failure of the parties to agree as to the amount of the loss, and within ten days after a written request to appoint referees under the provision for arbitration in the policy, that the insurance company is required by the statute to name three men under such provision. R. L. c. 118, § 60; Metropolitan Coal Co. vs. Boutell Transportation & Towing Co., 185 Mass. 391, 397, 70 N. E. 421; Union Ins. for Savs. vs. Phoenix Ins. Co., 196 Mass. 230, 81 N. E. 994, 14 L. R. A. (N. S.) 459, 13 Ann. Cas. 433; Paris vs. Hamburg-Bremen Fire Ins. Co., 204 Mass. 90, 90 N. E. 420; Atwood vs. Caledonian American Ins. Co., 206 Mass. 96, 92 N. E. 32. This disposes of the single narrow question presented to us. Under the stipulations of the agreed facts and of the report the entry must be in each case.

Judgment for the defendant.

SUPREME COURT OF OHIO.**ENSEL***vs.***LUMBER INS. CO. OF NEW YORK ET AL.*****1. INSURANCE—POLICY—TIME OF TAKING EFFECT.**

An insurance agent negotiated for the plaintiff, through the underwriters of an insurance company, a policy in that company. A few months later the underwriters notified the agent that the company would cancel the policy. The agent assented for the plaintiff, but said he would take the usual five days to obtain other insurance. Thereupon the underwriters offered to rewrite the insurance in the defendant company. The plaintiff, through the agent, assented, and a new policy was delivered the same day at 2 o'clock. The fire occurred at 6 o'clock.

Held, the court properly submitted to the jury the question as to the time the contract of insurance went into effect, and the finding of the jury that it went into effect at the time of delivery and was not postponed until five days later is not contrary to law.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

2. INSURANCE—POLICY—DESCRIPTION OF PROPERTY—SUFFICIENCY.

The subject of the insurance was described in these words: "On his interest in the lumber in Wabash Elevator No. 4, while on the premises, situated on Middle Ground near the Maumee river, Toledo. It is understood that the building is in process of demolition and said insurance is to cover above described lumber while on the premises."

Held, this advised the underwriters of the nature and extent of his interest as an element of the risk.

(For other cases, see Insurance, Cent. Dig. §§ 347-350; Dec. Dig. § 164.)

3. INSURANCE—ACTION ON POLICY—QUESTION FOR COURT.

Plaintiff's interest was acquired from the Wabash Railroad Company by written contract, in which he agreed to demolish the building and release the railroad from all damage by fire caused by it. The underwriters thoroughly inspected the risk on the premises before they wrote the policy. They did not inquire for the contract nor ask the plaintiff any questions, and he made no statement about it. A clause in the policy avoids it, "if the insured conceals any material fact concerning the insurance or any subject thereof."

Held, it was for the court to say whether his failure to mention the release was a material concealment within the terms of the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

4. INSURANCE—POLICY—CONSTRUCTION.

Another clause of the policy provided that: "If the company shall claim the fire was caused by the act or neglect of any person or corporation,

* Decision rendered, June 27, 1913. 102 N. E. Rep. 955. Syllabus by the Court.

the company shall be subrogated to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to the company by the insured."

Held, a stipulation such as the latter can only be used to work a forfeiture strictissimi juris. That clause being inserted by the insurer for the protection of the insurer is to be construed most strongly against the insurer and in favor of the insured. In view of the facts disclosed in this case, the court could not by way of purely legal construction give the stipulation the effect which the defendant claimed for it and void the policy.

(For other cases, see Insurance, Cent. Dig. § 1499; Dec. Dig. § 603.)

5. INSURANCE—POLICY—CONSTRUCTION.

Another clause avoids the policy, "if the subject of the insurance be a building on ground not owned by the assured in fee simple." The building was upon the ground described in the policy, but the fee simple title to the land was not in the plaintiff.

Held, the property insured was not part of the real estate, but lumber in a building in process of demolition. Therefore this clause of the policy has no application to this case.

(For other cases, see Insurance, Cent. Dig. §§ 601-635; Dec. Dig. § 282.)

6. INSURANCE—POLICY—ENFORCEMENT.

It also provided that "if the subject of the insurance be or become encumbered by a chattel mortgage the policy shall be void." There was a railroad mortgage by the Wabash company undischarged at the time it sold the lumber in the building to the plaintiff. That mortgage contained the usual proviso that the railroad company might dispose of equipment and material, replacing the same with new, and the company was doing that thing.

Held, the mortgage lien upon this lumber was discharged. For this and other reasons this defense was properly excluded.

(For other cases, see Insurance, Cent. Dig. §§ 636-651; Dec. Dig. § 283.)

(Additional Syllabus by Editorial Staff.)

7. EVIDENCE—"PRESUMPTION"—"INFERENCE."

A "presumption" is a rule which the law makes upon a given state of facts; an "inference" is a conclusion which, by means of data founded upon a common experience, natural reason draws from facts which are proven.

(For other cases, see Evidence, Cent. Dig. § 73; Dec. Dig. § 53.)

(For other definitions, see Words and Phrases, vol. 6, pp. 5535-5537; vol. 8, pp. 7761, 7762; vol. 4, p. 3579; vol. 8, p. 7687.)

Error to Circuit Court, Lucas County.

Action by one Ensel against the Lumber Insurance Company of New York and others. Judgment was entered for plaintiff in the Court of Common Pleas, and on error the Circuit Court entered judgment for defendants, and plaintiff brings error. Judgment of Circuit Court reversed, and that of Common Pleas affirmed.

The plaintiff held a policy of insurance in the Teutonia Fire Insurance Company for \$1,000 upon his interest in a frame building known as Wabash Elevator No. 4, in Toledo. By contract in writing he had purchased the material and lumber in the building

from the Wabash Railroad Company for \$2,000 and agreed to demolish the building. There was a stipulation in the contract that the railroad company was released from all liability on account of fire, from negligence, or otherwise, while the building was being demolished. The plaintiff obtained the insurance from a Mr. Smith, an insurance agent, who negotiated the policy through the Welles-Bowen Company, agents of the Teutonia Company. Before writing the policy, Mr. Bowen of that firm, with Mr. Smith, made a thorough inspection of the risk. About six months later, on June 24, 1910, Mr. Welles of that firm notified Smith that the Teutonia Company wished to cancel the policy, and he offered to rewrite the insurance in the defendant company. Smith communicated with the plaintiff Ensel by telephone, who assented to the change and said he would return the Teutonia policy. Thereupon Smith told Welles to rewrite the insurance in the Lumber Insurance Company, which he did and delivered the new policy to Smith about 2 o'clock the same day. Proper entries of the transaction were made in the Welles-Bowen Company's books and the defendant company was notified of the issuance of the policy. About one-fourth of the building was reduced to lumber by that date; and at 6 o'clock the building took fire and was consumed.

Attached to the face of the policy of the Lumber Insurance Company was a typewritten memorandum, called a "rider," as follows: "E. L. Ensel. \$1,000 on his interest in the lumber in Wabash Elevator No. 4, and, or while on the premises situated on Middle Ground near Maumee river, Toledo, Lucas County, Ohio. It is understood and agreed that the building is in process of demolition and said insurance is to cover above-described lumber while on the above-described premises, within 1,000 ft. of building."

The printed policy contained the following clauses: 1. "This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof." 2. "This entire policy unless otherwise provided by agreement, indorsed hereon or added hereto, shall be void * * * if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of the insurance be personal property and be or become incumbered by a chattel mortgage." 3. "If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment."

The record discloses that the Wabash Company and other companies operated steam railroads in the immediate vicinity of the elevator, that the cause of the fire was unknown, that Ensel had

never shown his contract with the Wabash Railroad Company, and that no one had ever asked him for it. The loss was much more than the insurance. Proofs of loss were filed with the company, which declined to pay, and this suit was commenced.

The defendant sets up four defenses: First, a general denial; second, the building was on ground not owned by the plaintiff; third, part of the property was incumbered by a mortgage given by the Wabash Railroad to the Bowling Green Trust Company; fourth, the subrogation clause, that plaintiff by his contract with the Wabash Company released that company, which fact he had not disclosed to defendant. Plaintiff in reply admitted the provisions of the policy; that the building was not on ground owned in fee simple; but alleged defendant knew that fact and waived that provision and the provision in regard to chattel mortgage, by the rider; and that defendant had full opportunity to know all of the provisions of the contract with the Wabash Railroad; and denied any concealment of a material fact. At the close of plaintiff's case, defendant made a motion for a directed verdict, which was renewed at the close of all the testimony and was overruled. Thereupon the defendant requested that the case go to the jury on all the issues, which was refused. The court submitted the first defense, holding the others were not separate defenses. The jury returned a verdict for the plaintiff; a motion for a new trial was overruled, and judgment entered. Defendant prosecuted error. The circuit court found the common pleas should have directed a verdict for defendant, and entered judgment accordingly. The plaintiff now prosecutes error to this court.

Ralph S. Holbrook and Claude R. Banker, both of Toledo, for Plaintiff in Error.

Brown, Hahn, Sanger & Froelich and King, Tracy, Chapman & Welles, all of Toledo, for Defendants in Error.

WILKIN, J.

(After stating the facts as above). The counsel for defendant lay down four propositions to support the judgment of the circuit court: (1) The policy never went into effect. (2) The minds of the parties never met upon the subject-matter of the contract of insurance. (3) Part of the property was personally incumbered by a chattel mortgage, contrary to the provisions of the policy. (4) Part was a building situate on ground not owned in fee simple, contrary to the provisions of the policy.

The evidential facts connected with the negotiation of the insurance are not in dispute. But there is a dispute about the ultimate facts which may be deduced from the proven facts: (1) Are they mere inferences which the judge may draw? (2) Are they legal presumptions which the law makes? (3) What conclusion of law arises from the ultimate facts thus determined?

As is usual in insurance cases, we are confronted with a mass

of diverse decisions and doctrines. We would have to write a treatise if we attempted to untangle the confusion and conflict of law presented in the briefs. We have not the time, if we had the inclination, to attempt to harmonize the cases. We shall dispose of this case upon its own intrinsic facts and the legal principles which we deem safe guides to its solution. To that end we shall consider the defendant's four propositions briefly.

[1] First. Did the policy not go into effect? This is based on the fact that, when Welles notified Smith that the Teutonia Company would cancel its policy, Smith answered that he would accept the notice and take the usual five days to obtain other insurance. If the colloquy had ended there, the Teutonia policy would have been current when the fire occurred some hours later. But the dialogue continued. Welles: "I can rewrite the policy in the Hudson's Underwriters" (Lumber Insurance Company). Smith, after consulting Ensel: "Go ahead, rewrite the policy and deliver it this afternoon." That was done and the fire occurred four hours later. Counsel for defendant say: "They wished to substitute one policy for another, but intended the new policy should come into force four days later." We think otherwise; the exchange was complete when the new policy was delivered that afternoon at 2 o'clock. The jury so found by their verdict, and the circuit court erred if it meant to reverse that finding.

[2, 3] Second. Did the minds of the parties meet upon subject-matter of the insurance? Counsel for defendant say the subject-matter is the risk of loss by fire which the underwriter agrees to take. He quotes Richards on Insurance, page 118: "And if, at the time of closing the contract, the one party has knowledge of facts material to the risk which, with or without design, he fails to disclose to the other party, then the parties are not contracting with reference to the same chance. There is no meeting of the minds upon the same essential subject-matter of their contract." The author supports that text by an extract from Lord Mansfield's decision in the leading case of *Carter vs. Boehm*, 3 Burr. 1905: "The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representations, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and induce him to estimate the risk as if it [the circumstance] did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void."

The circumstance alleged to have been withheld is the clause in Ensel's bill of sale from the Wabash Company releasing the company "from all liability on account of fire to said elevator while being wrecked." Was this release a material element of the risk about which the parties were negotiating when they arranged to exchange the Teutonia for the Hudson's Underwriters?

policy? If it became material at all, it did so only as a feature, not of the risk but of the contract; for if it became an element of the contract of indemnity it did so not as affecting the risk but only as affecting the contract of subrogation. That is to say, the policy contained two contracts: One to indemnify Ensel for loss by fire; the other to subrogate the company to any right he might have against anybody else to recover for the same loss by fire "from negligence or otherwise."

Now, it is not contended by the defendant that these obligations were reciprocal in the sense that the breach of the latter discharged the former, nor that Ensel actually agreed to confer upon the defendant the right of subrogation. The defendant's claim is quite different from either of these. It is that, there being a subrogation clause in the printed stipulations, the plaintiff assented to it when he or his agent accepted the policy, because the law presumes that he read it.

The next step in the argument is that the law presumes when he thus adopted that clause he represented that he still had all rights of recovery from everybody who should by negligence or otherwise set fire to the building.

The third step is that there was another stipulation preceding the subrogation clause, viz.: "This policy shall be void if the insured has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof;" therefore he deceived the insurance company, because he did not, between the delivery of the policy to Smith at 2 o'clock and the fire at 6 o'clock, reveal to the company that he had released his right of recovery for negligent fire by the Wabash Company. All the while it is conceded Ensel did not see the policy nor know of these stipulations, and he was asked no questions, and made no statements about anything.

Here we have a presumption upon a presumption, one of which cannot be true without the other is presumed to be true, from which to deduce the conclusion of deception—a conclusion deceptive surely enough. Formal logic may not be of much value as a constructive science, but it has legitimate use for criticism; it will expose error and puncture a fine fallacy. Let us syllogize defendants' argument:

Whoever knows, and does *not* speak lies.

The law assumes that E. knew and that E. *did* speak.

Therefore E. lied.

But this lame conclusion would not avail defendant, if it were sound. The defendant must proceed further. For, let us note, the defense stated in the answer is not what defendants' counsel misconstrues it to be in the argument. It seeks to avoid the contract for fraud. The defense is deceit, not want of mutuality. He must show not only that the represented fact was not true, but that the presumed misrepresentation was made for the purpose of deceiving the defendant; and that the defendant relied upon

the representation as true. Does the law presume that Ensel did what he did not in fact, and then presume that what he did not in fact he did for an evil purpose? Are we to have a third presumption, grounded upon the second, which was grounded on the first? This argument on presumption is strained and artificial and does not win our confidence.

And still this defense would not be complete. The insurance company was not deceived if its agent Bowen made a thorough inspection of the risk and inquired how much interest Ensel had in this building. Did he see the Wabash Company's copy of the contract with Ensel when he went down to the elevator to investigate the risk? The nature and extent of Ensel's interest was determined by that contract, and "his interest" was by the very language of the "rider" a very material element of the risk. If Ensel's interest was the perfect and complete ownership of the structure which he was to demolish, then he had all the right of recovery from the Wabash Company or anybody who caused its destruction by negligent fire or otherwise. If the company's agents did not examine this phase of the risk, can the company complain now?

Counsel for the company allow no presumption that the company knew what it might have known; and justly, we think, because it is a question of construction and inference, whether he affirmed the fact by silence, or whether under all the circumstances the company was under duty to inquire. But counsel also concede no ground for inference. We think there was ground for inference, and that the trial judge properly decided the question. If the circuit court ruled the question otherwise, it must have done so because there was no evidence that the company assumed the risk upon its own knowledge; ignoring the clear, uncontested testimony that Bowen "made a thorough inspection of the risk in detail."

On this question of knowledge, we are cited to the case of Nelson vs. Continental Insurance Co., 182 Fed. 783, 105 C. C. A. 215, 31 L. R. A. (N. S.) 598. That company had issued to Nelson a policy against fire to his "five-story building, situate Nos. 138-142 E-S of North Market St." The policy had a "rider," to wit: "This insurance also covers the assured's one-half interest in the south wall of the *four-story* * * * building, situate Nos. 144-146 North Market St." The court said: "The rider * * * indicates that the insurer had knowledge that the south wall of the Pilcher building was a party wall, outside of and beyond the limits of the premises generally described in the policy, which were the assured's 'five-story' * * * building, situate Nos. 138-142 E-S of North Market St. * * *' while the rider extends the protection of the insurance to the assured's interest in the south wall of the building described as 'situate Nos. 144-146 North Market St. * * *' Under these circumstances, defendant must be presumed to have had knowledge of plaintiff's

interest in the subject of the insurance, and to have issued its policy with such knowledge."

Counsel for defendant here criticise the case, but reluctantly admit that the Federal Court rightly raised the presumption under the circumstances of that case. Counsel can hardly consistently contend that the trial court went wrong in drawing an inference of the same sort under the circumstances of the case at bar. Furthermore, there may be a question whether, in the light of all the circumstances, the stipulation as to the subrogation was in fact violated. It runs in the future. "If this company *shall* claim that fire was caused by the act of negligence of any person or corporation, * * * this company *shall* be subrogated to all right of recovery by the insured * * * and such right *shall* be assigned to this company. That the Wabash Company caused the fire does not appear. If that fact shall subsequently appear, the defendant may assert it in an action for breach of this covenant. "Sufficient unto the day is the evil thereof."

[4] This stipulation is used in this action to work a forfeiture. The law abhors a forfeiture, and will countenance it only strictissimi juris. Besides, the stipulation, being written in the policy by the insurer for the protection of the insurer, is to be interpreted most strongly against the insurer. Here the insurer seeks to construe it as implying, nay, as importing by presumption of law, a representation that the insured had a right of recovery against the Wabash Company. The representation can hardly be imported into the document by strict construction. The most the defendant could claim is a mere inference that the plaintiff represented that he had the right to sue the Wabash Company if that company should negligently or otherwise set fire to the property, and that he so represented falsely and purposely. That was an inference for the trial judge, if he found the facts would justify it. The judge did not so find. We think he was right; he properly construed the contract.

[5] Third. This property was incumbered by an undischarged mortgage upon the Wabash Railroad. What we have said supra about notice of and inquiry into the extent of his interest applies to this defense. Insurance is often written, "upon the assured's interest as his interest may appear." The "rider" is not materially different in effect. It was notice that his ownership of the building was not perfect, absolute ownership. The mortgage does not appear in the record, but we glean that there was the usual proviso that the railroad company might dispose of equipment and material, replacing the same with new. For aught that appears this is what the railroad company was doing. If so, the lien upon this lumber was discharged. This defense is not valid.

[5] Fourth. The elevator was situate on ground not owned by the plaintiff in fee. The property insured was not the building, but the lumber contemplated as personalty, though part of a

structure "in process of demolition." The property was upon the land where it was described to be. The fact that the fee simple title to the land was not in the owner of the personality insured, is not material.

[7] The error of counsel throughout this case lies in a confusion of terms. They mistake inference for presumption—a slip too often unconsciously made by judges as well as lawyers. A "presumption" is a rule which the law makes upon a given state of facts; an "inference" is a conclusion which, by means of data founded upon common experience, natural reason draws from facts which are proven. A presumption of law may be *prima facie* only, that is, a hypothesis which will admit of proof to the contrary; or it may be absolute, that is, a postulate which, for reasons of legal policy, the law will not permit to be contradicted. The latter may be a mere fiction, assumed to be true although the known fact may be the very opposite. It is the latter sort which we are urged to adopt in this case. There may be cases, having somewhat similar features, where judgment upon presumptions may be legitimate. This is not one of them.

Judgment of the circuit court reversed, and that of the common pleas affirmed.

Shauck, C. J., and Johnson, Donahue, Wanamaker, and Newman, JJ., concur.



SUPREME COURT OF MINNESOTA.

COPPOLETTI ET AL.

v.s.

CITIZENS' INS. CO. OF MISSOURI.*

1. INSURANCE—TRIAL—ACTION ON POLICY—INSTRUCTIONS
Instructions of the trial court to the jury considered, and *held* to be without any error justifying the granting of a new trial.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1771-1784; Dec. Dig. § 669; Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.)

(*Additional Syllabus by Editorial Staff.*)

2. WORDS AND PHRASES—"WAIVER."

A "waiver" may be said to be a voluntary relinquishment of a known right. It need not be by word of mouth, and it need not be in writing. It may be consent expressly or impliedly given. It may consist in the doing of some act which is inconsistent with an intention.

* Decision rendered, Nov. 7, 1913. 143 N. W. Rep. 787. Syllabus by the Court.

tion to insist on a strict performance, or in a course of conduct inconsistent with and in disregard of the terms of the contract.
(For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381, 7831, 7832.)

3. INSURANCE—CONDITIONS OF POLICY—WAIVER.

Where an insurer, with knowledge that the insured has taken out additional insurance in violation of the policy, consents thereto, or elects to and treats the policy as a subsisting valid contract, he waives the breach of the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1026, 1027, 1030, 1035, 1040; 1057; Dec. Dig. § 388.)

4. APPEAL AND ERROR—PRESENTATION BELOW—REFUSAL OF INSTRUCTIONS.

The refusal of an instruction will not be reviewed on appeal, where no exception is taken thereto below.

(For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1523, 1525-1532; Dec. Dig. § 263.)

5. INSURANCE—CONDITIONS OF POLICY—WAIVER.

Where the procurement of additional fire insurance, unless consented to, ipso facto avoids the existing policy, the mere failure of the insurer to cancel such policy after knowledge of the additional insurance will not constitute an election to continue the policy in force.

(For other cases, see Insurance, Cent. Dig. §§ 1037, 1038; Dec. Dig. § 390.)

Appeal from District Court, St. Louis County; H. A. Dancer, Judge.

Action by Frank Coppoletti and others against the Citizens' Insurance Company of Missouri. Verdict for defendant. From an order granting a new trial, defendant appeals. Reversed.

Hugh J. McClearn, of Duluth (Barger & Hicks, of Chicago, Ill., of counsel), for Appellant.

John Jenswold, Jr., of Duluth, for Respondents.

BUNN, J.

This is an action to recover the amount of a loss under a policy of fire insurance. The issue made by the pleadings was whether subsequent insurance procured by plaintiff in excess of the amount permitted by the policy was consented to or waived by defendant. The jury returned a verdict for the defendant. The trial court granted plaintiff's motion for a new trial, basing its order on what it considered error in its instructions to the jury. Defendant appealed from the order granting a new trial.

The trial court said in its memorandum that the verdict rendered was amply supported by the evidence, but was of the opinion that it was a prejudicial error to instruct the jury in substance that in order to find for the plaintiff they must find that defendant consented to the additional insurance *and also* waived the provisions of the policy prohibiting it. In other words, the position of the court on the motion for a new trial,

and the position of counsel for plaintiff at all stages of the case, was that "consent" and "waiver" were separate and distinct issues, that plaintiff was entitled to recover if defendant *consented* to the additional insurance, or if it waived the policy provisions prohibiting such insurance.

The complaint alleged the procuring of the additional insurance by plaintiff, and that *thereafter* defendant with full knowledge consented thereto, and elected to treat the policy as a subsisting and valid contract, continuing to receive the monthly installments of the premium, "and it did thereby with such full knowledge and its said action waive its right to insist upon the provision in its policy against procuring subsequent insurance, and is now barred and estopped from making the procuring of such subsequent insurance a defense herein." The answer denied these allegations, in substantially the words of the complaint.

[1] We are unable to escape the conclusion that the trial court was wrong in setting aside the verdict on the ground stated in its memorandum. The policy permitted concurrent insurance on the building to an amount not exceeding its insurance value, stated to be \$1,550. It was in the standard form, and contained the provision that it should be void "if the insured now has or shall hereafter make any other insurance on said property without the assent of the company." It was conceded that plaintiff, after the policy was issued, procured other insurance on the property in excess of its insurable value as agreed upon. There was no attempt to plead or prove that defendant's agent either expressly or by implication "consented" or "assented" to the procuring of this other insurance before it was actually taken. The evidence was directed to the question of the agent's knowledge that plaintiff had procured the additional insurance, and to his conduct as indicating his acquiescence, and his waiver of the policy provisions.

It seems to us that there was no issue of "consent" in the case. The issue was waiver. Any consent or "assent," given after the additional insurance was actually procured, would be evidence of waiver. Any words of the agent indicating his assent or acquiescence, and conduct of his inconsistent with the idea that the policy was void, would be evidence on the issue of waiver. But we are not able to hold that there were two independent and distinct issues raised by either the pleadings or the proof. The question for the jury was whether defendant's agent, with knowledge that plaintiff had procured other insurance in violation of the policy, waived the forfeiture. This was really the only question submitted to the jury by the instructions of the court, and it was clearly and correctly submitted. In so far as the court used the word "consent" in its charge, it was used as indicating a means or method of waiving the forfeiture, rather than as making a separate issue. From the charge as a whole we are unable to see how the jury could understand that plain-

tiff, in addition to proving a waiver, must prove consent. It is difficult for men accustomed to make nice distinctions in the meaning of words to comprehend any difference between consent and waiver as applied to words or actions of the agent after the additional insurance had been procured. We think it clear that any such distinction would not be seen by the jury, under the instructions in this case.

The instruction decided by the trial court to be erroneous and prejudicial was this: "If you find that he [the agent] did have such knowledge of this additional insurance before the fire, you will then proceed to determine whether, acting for his company, he consented to such insurance *and* waived the breach of the contract involved in the procurement of it." Even granting that there was slight inaccuracy in using "and" instead of "or," this instruction only tells the jury to consider whether the agent consented to the insurance and waived the forfeiture. It does not, even taken by itself, tell the jury that they must find both consent and waiver. Nor is defendant's fourteenth request, given by the court open to the objection that it conveys the idea that, to find for the plaintiff, there must be both consent and waiver. This request instructed the jury that, if they found from the evidence that defendant *did not consent* to the additional insurance *and* did not waive the provisions of the policy, plaintiff could not recover. In other words, if defendant did consent, *or* did waive, plaintiff could recover. We are satisfied that the conscientious and praiseworthy desire of the trial court to correct any possible errors of its own led it to discover error and prejudice where none really existed. The jury were told in language so clear that it could not be misunderstood that, if defendant waived the forfeiture by the words or conduct of its agent, plaintiff was entitled to a verdict.

[2, 3] The following instruction defined the issue clearly, and must have made it perfectly plain to the jury: "A waiver may be said to be a voluntary relinquishment of a known right. It need not be by word of mouth, and it need not be in writing. It may be consent expressly or impliedly given. It may consist in the doing of some act which is inconsistent with an intention to insist on a strict performance, or in a course of conduct inconsistent with and in disregard of the terms of the contract. The plaintiff claims that Mr. Carley waived such breach if with knowledge of the additional insurance he expressed to the plaintiff his consent thereto; and if with such knowledge he did express his consent thereto to the plaintiff, then as a matter of law he did thereby consent to the additional insurance and waived the breach of the condition involved in procuring it. He waived it, also, if with such knowledge he elected to and did treat and recognize the policy of insurance as a subsisting and valid contract." This instruction clearly makes waiver the only issue in the case. It is a correct and comprehensive statement of the law.

[4] The effort to sustain the order granting a new trial on the ground that the court refused to give certain instructions requested the plaintiff is unavailing. No exception was taken to the refusal to give any of these requests, nor was any error in this regard assigned on the motion for a new trial.

[5] There was no error in giving defendant's third request. It was correct that procuring the additional insurance, unless consented to, ipso facto avoided the policy, and that the mere failure to cancel the policy after knowledge of such insurance did not justify a conclusion that defendant had elected to continue the policy in force. It is claimed that the court erred in conveying to the jury the idea that the secret intention of the agent was material. The charge is not fairly open to this objection.

After a careful scrutiny of the instructions given, we feel satisfied that there was no error, and nothing to confuse or mislead the jury. Concededly the verdict has ample support in the evidence. We think it ought to have been allowed to stand.

The order granting a new trial is reversed, with directions to enter judgment on the verdict.

SUPREME COURT OF CALIFORNIA.

O'NEILL

vs.

UNION ASSUR. SOCIETY, Ltd.

SAME

vs.

LAW UNION & ROCK INS. CO., Ltd. (S. F. 6,180.)*

1. TRIAL—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

Where, as applied to the conditions of which there was evidence, to which it obviously referred, the instruction, in an action on a fire policy, that plaintiff's right to recover was not affected by the presence on the premises, at the time of the fire, of any gasoline which came into the premises in the reservoirs of automobiles, was proper, complaint may not be made that it was broad enough to have allowed great quantities of gasoline being so brought in, and then emptied out and stored in the building—a thing of which there was no evidence.

(For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.)

* Decision rendered, Oct. 9, 1913. Rehearing denied, Nov. 8, 1913. 135 Pac. Rep. 1124.

2. INSURANCE—LIABILITY—NEGLIGENCE OF INSURED.

The instruction, in an action on a fire policy, that the insurer would not be relieved by the fact that the fire occurred through the negligence of plaintiff or his tenant, is in conformity to Civ. Code, § 2629, declaring that an insurer "is not exonerated by the negligence of the insured, or of his agents or others."

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1771-1784; Dec. Dig. § 669.)

**3. NEW TRIAL—HARMLESS ERROR—D I S R E G A R D I N G I N-
S T R U C T I O N S .**

Where a fire policy allowed insured to have more than one automobile on the premises at one time, as he had at the time of the fire, the disregarding by the jury of an instruction to the contrary did not make the verdict against law, or, at least, does not require a reversal.

(For other cases, see New Trial, Cent. Dig. §§ 132-134; Dec. Dig. § 66.)

4. NEW TRIAL—AGENTS—IMPUTED NOTICE.

Agents of an insurance company whose only connection with an insured was that he requested them as agents of the company to issue to him policies, were not his agents so as to require their knowledge to be imputed to him.

(For other cases, see New Trial, Cent. Dig. § 237; Dec. Dig. § 113.)

Department 1. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Two actions, both by W. J. O'Neill, one against the Union Assurance Society, Ltd., the other against the Law Union & Rock Insurance Company. From judgments for plaintiff, and from orders denying motions for new trial, defendants appeal. Affirmed.

J. F. Riley, of San Francisco, and Geo. Cosgrave, of Fresno, for Appellants.

Chickering & Gregory, of San Francisco, and Sutherland & Barbour, of Fresno, for Respondent.

SHAW, J.

In these actions the plaintiff sued to recover upon three policies of insurance issued to him, one of them by the Union Assurance Society, Ltd., the other two by the Law Union & Rock Insurance Company, Ltd. In each of the cases the verdict was for the plaintiff and judgment was entered thereon. Defendants each moved for a new trial and the motions were denied. The appeals are from the judgments and from orders refusing new trials. The two cases were tried upon the same evidence and the record presents them in one transcript.

The property insured and the fire which damaged and destroyed it were the same as those considered in the opinion this day filed in the two cases of O'Neill vs. Caledonian Ins. Co. and O'Neill vs. American Ins. Co. (S. F. No. 6,179) 135 Pac. 1121, in which the judgments and orders in favor of O'Neill were affirmed. The three policies sued on in the two actions pre-

sented in the record in No. 6,180 are of the same form as those involved in S. F. No. 6,179. The evidence is also substantially the same and the propositions of law presented and decided there are also involved in these actions. The discussion and conclusions set forth in that decision are equally applicable here. We refer to them, without repeating them, as a part of the opinion of the court applicable to these cases. It is necessary, however, to discuss some additional points not presented in the other cases.

[1] Instruction 16 stated that the right of plaintiff to recover was not affected by the presence on the premises, at the time of the fire, of any gasoline which *came into* the premises in the reservoirs of automobiles. In criticism of this instruction it is suggested that it would allow the jury to find for the plaintiff, although thousands of gallons of gasoline might have been brought into the building in the reservoirs of machines and thereafter emptied into gasoline tanks and kept stored in the building. The criticism is not based upon any facts or any evidence in the case. No such proceedings were shown. It is obvious that the instruction referred to the gasoline brought into the building in the reservoir of Warlow's machine at the time it was left for repairs and which was afterwards drained out of the reservoir while it was being repaired. The jury could not have misunderstood it. This, as shown in the other opinion, was not a violation of the policy.

[2] Instruction 17 stated that the insurance company would not be relieved by the fact that the fire occurred through the negligence of the plaintiff or of a tenant of the building under him. This is in conformity with the provision of section 2629 of the Civil Code, declaring that an insurer "is not exonerated by the negligence of the insured, or of his agents or others."

[3] Instruction 6 stated to the jury that the policy allowed but one automobile to be stored or stabled on the premises and that if more than one was stored or stabled therein they should find for the defendant. The appellants contend that the verdict was against law because the jury must have disregarded this instruction; it appearing that a number of automobiles were contained in the building at the time of the fire. Under the principles stated in the former decision it was allowable for the plaintiff to keep and have more than one automobile in the premises at one time. The fact that the court erroneously instructed the jury to the contrary does not make the verdict against law, or, at all events, does not justify a reversal of the judgment, since the presence of more than one automobile was clearly allowed by the policies in question. O'Neill vs. Thomas Day Co., 152 Cal. 361, 92 Pac. 856, 14 Ann. Cas. 970. These observations apply also to some other instructions which were too favorable to the defendants and which the jury apparently disregarded.

[4] The rider in one of the policies did not contain the clause in the description providing that the premises might be used as an auto repair shop, nor the warranty contained in the other riders. The complaint alleged that this was a mutual mistake, that the policies had been issued by the company and another and different rider, not expressing the contract between the parties, had been accidentally attached thereto, and it asked that the policy be reformed accordingly. The court, upon this issue, found in favor of the plaintiff and ordered the reformation of the policy. We have examined the evidence on this subject and think that it was sufficient to sustain this finding. We do not deem it necessary to discuss it at length. The principal point, made upon the proposition that the evidence is insufficient is that the agents of the insurance company, Shepherd & Teague, were also the agents of O'Neill, and that their knowledge must be imputed to him. There is no warrant for this suggestion. As shown in the other opinion, they were the agents of the company, and their only connection with O'Neill arose from the fact that he requested them as agents of the company to issue to him the policies of insurance upon the property.

Some other questions are presented, but they are not of sufficient importance to require notice. We find no prejudicial error in the record.

The judgment and order appealed from in each of the above-entitled cases are affirmed.

We concur: Angellotti, J.; Sloss, J.



KANSAS CITY COURT OF APPEALS.

MISSOURI.

PATTERSON

vs.

AMERICAN INS. CO. OF NEWARK N. J.*

1. INSURANCE—VACANCY—"WAIVER."

An agreement between plaintiff and the agent of defendant insurance company, which had insured plaintiff's property, that if it should become vacant he would attach a vacancy permit to the policy did not constitute a waiver of a forfeiture for a vacancy subsequently occurring,

* Decision rendered, Oct. 6, 1913. 160 S. W. Rep. 59.

since there can be no waiver of a forfeiture until after the ground for forfeiture has occurred.

(For other cases, see Insurance, Cent. Dig. §§ 1016, 1017; Dec. Dig. § 382.)
(For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381, 7831, 7832.)

2. INSURANCE — FIRE POLICY — VACANCY — ACTION — QUESTION FOR JURY.

In an action on a fire policy, evidence *held* to require submission to the jury of the question whether plaintiff notified defendant's agent before the loss that the property had become vacant and requested the attachment of a vacancy permit.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

3. INSURANCE—FIRE POLICY—VACANCY—WAIVER—LIMITATION OF LOSS.

Where a vacancy permit was not attached to the policy sued on, and plaintiff was permitted to recover on the theory that the forfeiture because of vacancy without a vacancy permit was waived, he was entitled to recover the full face of the policy and not three-quarters thereof as would have been provided by a vacancy permit if issued; the waiver being of the forfeiture of the policy and not of the issuance of the vacancy permit.

(For other cases, see Insurance, Cent. Dig. § 1791; Dec. Dig. § 666.)

4. INSURANCE—VACANCY—FORFEITURE—WAIVER.

A condition in a fire policy for forfeiture in case the property becomes vacant may be waived, and if proper notice of vacancy is given the policy will remain in force until the insurer takes action to terminate the insurance.

(For other cases, see Insurance, Cent. Dig. § 941; Dec. Dig. § 372.)

5. INSURANCE — SETTLEMENT — VEXATIOUS DELAY — QUESTION FOR JURY.

Whether an insurance company has been guilty of vexatious delay in settling a loss is for the jury only when, from a general survey of all the facts and circumstances in the case, an inference can be drawn that the refusal to pay was unjustifiable and vexatious.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

6. INSURANCE—FIRE POLICY—LOSS—REFUSAL TO SETTLE—PENALTY—“VEXATIOUS DELAY.”

In an action on a fire policy, defendant claimed a forfeiture because of vacancy. On the first trial plaintiff relied on an oral agreement by the insurance agent that if the property became vacant in the future he would attach a vacancy permit. This, defendant contended, was invalid, which contention was upheld on appeal, and on the second trial plaintiff was permitted to recover by proving notice of vacancy to the agent prior to loss and a failure of the insurer to cancel the policy, the receipt of which notice was denied. *Held*, that the failure to settle the loss was neither unjustifiable nor vexatious so as to render defendant liable to a penalty and for plaintiff's attorney's fees under Rev. St. 1909, § 7068, authorizing a recovery of a penalty and attorney's fees in an action on a policy where defendant's failure to pay was unjustifiable and vexatious.

(For other cases, see Insurance, Cent. Dig. § 1498; Dec. Dig. § 602.)

(For other definitions, see Words and Phrases, vol. 8, p. 7312.)

Appeal from the Circuit Court, Jackson County; James H. Slover, Judge.

Action by Henry M. Patterson against the American Insurance Company of Newark, N. J. Judgment for plaintiff, and defendant appeals. Affirmed on condition.

Fyke & Snider, of Kansas City, for Appellant.
Yates & Mastin, of Kansas City, for Respondents.

TRIMBLE, J.

For the second time this case is here on appeal by defendant. See *Patterson vs. Insurance Co.*, 164 Mo. App. 157, 148 S. W. 448. The suit is on a fire insurance policy covering a farmhouse. The policy contained a clause that: "If the building insured be or become vacant and unoccupied without the consent of the Western manager of this company indorsed hereon, then this policy shall be null and void." There is no doubt but that the property became vacant some time, perhaps two months, before it burned on February 10, 1908.

[1] At the first trial, considered on appeal in 164 Mo. App., the defense was made that the house was vacant and no consent thereto or vacancy permit had been obtained, and the policy was therefore by its terms null and void. To meet this defense plaintiff urged that, before the vacancy occurred, he had an agreement with defendant's agent that, if the property became vacant at any time in the future, he would attach a vacancy permit, and therefore there was a waiver of the forfeiture in the policy as to vacancy without consent. On appeal, however, this court held that such agreement, before the vacancy, could have no effect because there can be no waiver of a forfeiture until after the ground of forfeiture has occurred and remanded the case for a new trial on the ground that, while plaintiff could not avoid forfeiture because of such prior waiver, yet there was some evidence tending to show that plaintiff, after the vacancy and about three weeks before the fire, had notified the defendant's agent of the vacancy and requested him to issue and attach a vacancy permit, and, if this were true, defendant had, by failing to act, waived the forfeiture.

Upon a second trial this feature of the case was litigated and a verdict for the plaintiff was returned for the full amount of the policy, with interest, and \$75 additional as 10 per cent damages, and a further sum of \$112.50 as a reasonable attorney's fee for vexatiously refusing to pay the amount due plaintiff.

[2] Defendant contends that the case should be reversed because plaintiff's own testimony, and the conceded circumstances under which the notice and request are claimed by him to have been made, show that no notice was ever given or request made. This contention requires an examination of the testimony.

Plaintiff was living in Oklahoma. The house in question was

in Jackson County, Mo., near Independence. Plaintiff had an agent at Independence, named Noland.

Plaintiff's claim that he notified Rider, defendant's agent, of the vacancy and to put a vacancy permit on the policy is based on his testimony that on January 21, 1908, he wrote Rider, defendant's agent, at Independence, Mo., as follows: "I have been informed that my house upon which I hold American Insurance policy has become vacant. Please see that vacancy permit is placed." Defendant's agent Rider denied ever receiving such a letter. Plaintiff introduced in evidence a pencil copy of such alleged letter; the defendant not producing the original on notice to do so. The testimony of plaintiff that he wrote such a letter on January 21, 1908, would not appear strange were it not for the fact that on February 13, 1908, three days after his house burned, he wrote to his agent Noland, saying: "Yours of the 10th at hand saying that my house had burned down. Have you gotten any particulars in the case since writing? Now, Mr. Noland, I want you to give me the two following points, namely, how long has the house been vacant, and have you had a vacancy permit on, or did you have a vacancy permit on when the house burned? Please write me these questions by return mail, and don't say a word to the insurance agent about this as it may cut a figure in the way of getting my insurance."

On March 15, 1908, plaintiff again wrote his agent Noland as follows: "Regarding the burning of my house I hold an insurance policy for \$750, of which I have been trying to adjust with the company. They have now turned my claim down and refuse to pay any part on the ground the house was vacant at the time of fire. Mr. Noland, this is rather a severe blow on a poor man like myself. Now what I wish to do is this, establish if possible more proof regarding the exact situation. Eventually I may be compelled to fight them in the courts as a last resort after all other means have failed, thereby making possible much trouble for us all. Now, Mr. Noland, I want you to assist me in this matter by trying to learn the true standing of the case as regards to a vacancy. Are you certain that there was nothing left in the way of furniture, a chair, table, stand, or other article in the building at the time of the fire, or at the time that you was there when you reported to me that the building was vacant? Such articles might establish in law an occupancy. Do you know where Mr. Green Allen, the former tenant, is; try and find out so I can write him concerning the case. The insurance agent at Independence agreed to place vacancy permits on the house in case of vacancies. Suppose he must have neglected to do so. Kindly learn all you can about the case and report as early as possible."

Twelve days later, on March 27, 1908, plaintiff wrote Rider, the insurance agent at Independence, as follows: "Yours of recent date was duly received, replying will state that adverse

to your understanding, I was not aware that the house in question was vacant until about the time the fire occurred, this being the case along with circumstances as named in previous letter I am unable to see where I am at fault."

These letters were admitted by plaintiff to have been written by him, and he stated that he tried to give Rider the true state of facts.

It must be conceded by all candid minds that these letters, written by plaintiff after the fire, make his statement that he wrote the letter of January 21st sound "mighty fishy," if a colloquialism may be permitted in a judicial opinion. On March 27, 1908, he wrote Rider: "I was not aware that the house in question was vacant until about the time the fire occurred." But now he claims that on January 21, 1908, he wrote the agent saying he had been informed the house was vacant and to put a vacancy permit on the policy. When did he tell the truth? Now or then? Did he tell it when he wrote the letter of March 27th and thought it would be of some help to him to claim ignorance of the fact it was vacant, or did he tell it when he had learned it is necessary in order to recover to know of it and notify the agent of the vacancy on January 21st. It is said that, however this may be, it is a question for the jury to say whether he told the truth the first time or the last. But is there not room for a third supposition, namely, that the truth was not told on either occasion? It seems to the writer that if the effect of a failure to secure a vacancy permit can be obviated, under such circumstances as are disclosed here, then the vacancy clause in any policy can be eliminated and rendered nugatory by the plaintiff calmly claiming that he notified the agent of the vacancy and relying confidently upon the verdict of a jury to do the rest. It may be that, strictly speaking, it is a question for the jury to say whether he told the truth the first, second, or neither of said times, and consequently we have no right to interfere. This question was considered in the former decision in passing on the defendant's demurrer to the evidence, and it was held that, although plaintiff's evidence was "strongly contradicted," yet the evidence that the notice of vacancy was given was of sufficient substance to justify the resubmission of the case to the jury. *Patterson vs. Insurance Co.*, 164 Mo. App. loc. cit. 164, 148 S. W. 448. The evidence then was the same as now, and consequently the question can be said to have been once adjudicated and settled. In view of this fact, and in view of the further fact that the jury is perhaps the judge of the question when the truth was told, if ever, and that possibly there may be ground for attributing the inconsistency to mistake and fallibility of human memory, and that two juries and two trial judges and three appellate judges have heretofore held with plaintiff in the matter, the writer is inclined to be reserved and conservative in his opinion on the point and to hold, not without some consider-

able worry and misgivings, that the obvious contradictions and inconsistencies between plaintiff's testimony and his admitted acts are not sufficient to entirely overthrow the evidence upon which plaintiff's case went to the jury.

[3] Defendant contends also that if plaintiff is entitled to recover more than three-fourths of the face of the policy, since the only vacancy permit in use by the company provided that, if the fire occurred while the property was vacant, the amount recovered should be only three-fourths of the loss. But this contention is based on a misconception of the grounds upon which the plaintiff's right to recover is planted. The policy does not provide that if the loss occurs while the house is vacant, the amount due thereunder shall only be three-fourths of the loss. That appears only in the vacancy permit. The suit is not based on a policy with a vacancy permit attached but on a policy in which the clause rendering it void has been eliminated by waiver, leaving it a policy for the full amount insuring the house whether vacant or occupied. The case of *Sullivan vs. Insurance Co.*, 89 Mo. App. 106, is not in point because in that case the vacancy permit had become operative. In other words, the suit in that case was on a policy with a vacancy permit attached, and hence plaintiff could recover only according to the terms thereof. The suit is not based in any manner on the permit; neither are its terms set up as matter of defense by the pleadings. The sole issue was whether the policy was in force or had become void by reason of the vacancy, and that issue depended solely on whether the forfeiture had been waived.

[4] The condition in the policy as to the property being vacant can be waived the same as any other condition. *Clay vs. Insurance Co.*, 97 Ga. 44, 25 S. E. 417. If proper notice is given, the policy will remain in force until the insurer takes action to terminate the insurance. 2 *Cooley's Briefs on Ins.* 1657, 1658; *Wakefield vs. Insurance Co.*, 50 Wis. 532, 7 N. W. 647; *Strunk vs. Insurance Co.*, 160 Pa. 345, 28 Atl. 779, 40 Am. St. Rep. 721. The only place in which the reduction of one-fourth of the insurance appears is in the vacancy permit itself, not in the policy; and, since the vacancy permit never came into existence at all, the reduction clause never came into existence. The policy was on the house for a certain amount of insurance with a clause rendering it null if the house became vacant without the consent of the company. When as found by the jury, the company was notified on January 21, 1908, that the house was vacant, it had three alternatives: First, to immediately cancel the policy and return the unearned premium; second, to consent to the vacancy and place a permit on the policy which by its terms would reduce the insurance one-fourth; third, to waive the vacancy clause in the policy by making no objection and retaining the premium, thereby leaving the policy in force for the full amount with nothing in the policy covering vacancy. According to the verdict,

this is what was done. The amount of insurance due, therefore, is the amount of the policy.

In addition to the question of waiver, the trial court submitted the question of vexatious refusal to pay the loss, and the jury in addition to a finding of \$959.12 due on the policy, assessed a penalty of \$75 and an attorney's fee of \$112.50 under section 7068, Rev. St. Mo. 1909. In our opinion the record does not disclose any evidence to warrant the court in submitting the question of vexatious refusal to pay.

[5] It is true the whole question of vexatious delay is a question for the jury, as has been decided by *Keller vs. Insurance Co.*, 198 Mo. 440, 95 S. W. 903, but it is only so when, from a general survey of all the facts and circumstances in the case, an inference can be drawn that the refusal was unjustifiable and vexatious. *Keller vs. Insurance Co.*, *supra*, 198 Mo. loc. cit. 460, 461, 95 S. W. 903.

[6] And while affirmative proof is not required to show vexatious refusal, yet the penalty should not be inflicted unless the evidence and circumstances show that such refusal was wilful and without reasonable cause as the facts appeared to a reasonable and prudent man before the trial; and merely because the judgment, after trial, is adverse to defendant's contention is no reason for inflicting the penalty. *Blackwell vs. Insurance Co.*, 80 Mo. App. 75. In the first trial plaintiff relied upon an oral agreement on the part of the agent that, if the house became vacant in the future, he would attach a vacancy permit. This, defendant contended, was not valid, and on appeal defendant's contention was upheld. A refusal to pay on this ground could not be held vexatious; and while plaintiff's claim that he wrote a letter to defendant's local agent notifying him of the vacancy has been upheld by the jury in the second trial, and a waiver of the vacancy clause has been thereby established, still in view of the admitted correspondence of plaintiff contradicting his claim of having written such letter, and the denial of the agent of having received it, the company had a right to litigate that question without being penalized for so doing. In other words, the facts and circumstances admitted by plaintiff are sufficient to give the company reasonable grounds for defending the suit and takes the element of vexatiousness out of its refusal to pay.

If, therefore, the plaintiff will, within fifteen days, file a remittitur of \$187.50, being the aggregate amount of the penalty imposed and attorney's fee assessed, together with 6 per cent interest thereon from the date of the judgment, this case will be affirmed, otherwise it will be reversed and the cause remanded. All concur.

O'NEILL vs. CALEDONIAN INS. CO.—SAME vs. AMERICAN INS. CO. (S. F. 6,179.)*

(Supreme Court of California.)

1. INSURANCE—POLICY—CONSTRUCTION—RIDER—WRITING AND PRINTING.

In a case where, by provision of it, the rider on a fire policy prevails over the suspension clause of the policy, the provision in the written part of the rider that the building is to be used as an "auto repair shop" permits such use of gasoline on the premises as is usual and necessary to the conduct of such a shop; the printed part of the rider being, by provision of Civ. Code, § 1651, as to repugnancy between the written and printed part of contracts, controlled by the written part.

(For other cases, see Insurance, Cent. Dig. §§ 301-304; Dec. Dig. § 149.)

2. INSURANCE—WARRANTY IN RIDER—AUTOMOBILES ON PREMISES.

The presence on the premises, at the time of the fire, of several automobiles, each with gasoline in its tank, did not suspend the fire policy; the warranty in the rider on the policy, which by provision of Civ. Code, § 1654, is to be construed most favorably for insured, that no gasoline other than in the reservoirs of "machines" shall be admitted into the building where "the machine is permanently or temporarily stabled," allowing more than one machine to be kept there.

(For other cases, see Insurance, Cent. Dig. §§ 782-791; Dec. Dig. § 326.)

3. INSURANCE—POLICY—SUSPENSION—INCREASE OF RISK.

The presence prior to the fire of forbidden gasoline on the premises, it having been removed before the fire, did not affect liability for loss; the policy not providing that it should be void for such presence, but only that the insurer should not be liable for loss occurring while the risk was increased by presence of gasoline in excess of a quart, that is suspending the policy during such presence.

(For other cases, see Insurance, Cent. Dig. §§ 702, 763, 828; Dec. Dig. § 309.)

4. INSURANCE—POLICY—MUTUAL MISTAKE—REFORMATION

The mistake of the agents of an insurance company, or of their clerk, in putting on a renewal policy the old form of rider, instead of the new form, of which latter form insured did not know, was not imputable to insured, so as to render the mistake mutual, and so permit of reformation for the company after a fire.

(For other cases, see Insurance, Cent. Dig. §§ 265-272; Dec. Dig. § 143.)

5. PLEADING—ADMISSION BY FAILURE TO DENY.

Plaintiff, in an action on a fire policy, is not required to prove occupancy of the building as specified in the policy; the admission of such fact, by the answer's failure to deny the allegation thereof in the complaint, not being destroyed by the answer's allegation that the building was also occupied for other and forbidden purposes,

* Decision rendered, Oct. 9, 1913. Rehearing denied, Nov. 8, 1913. 135 Pac. Rep. 1121.

that being affirmative matter by way of defense, the burden of proving which is on defendant.

(For other cases, see Pleading, Cent. Dig. §§ 270-275; Dec. Dig. § 129.)

Department 1. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Two actions, both by W. J. O'Neill, one against the Caledonian Insurance Company, the other against the American Insurance Company. From judgments for plaintiff, and from orders denying motions for new trial, defendants appeal. Affirmed.

J. F. Rily, of San Francisco, and Geo. Cosgrave, of Fresno, for Appellants.

Chickering & Gregory, of San Francisco, and Sutherland & Barbour, of Fresno, for Respondent.



WALMSLEY VS. STOWELL ET AL.

(Kansas City Court of Appeals. Missouri.)

MONEY RECEIVED—VOLUNTARY PAYMENT—RECOVERY.

Plaintiff, an insurance broker, having applied to defendants for insurance for a client, policies were issued, and at the end of the month plaintiff advanced the premiums for his client, and defendants paid them to the receivers of the insurance companies writing the policies which in the meantime had become insolvent. The client died before paying any of the premiums to plaintiff, the property was destroyed by fire, and the insurers having become insolvent, nothing was collected thereon. Held, that, plaintiff having voluntarily advanced the premiums to defendants, and they having paid the same to the receivers of the insurers, defendants had no money belonging to plaintiff which in equity they ought not to keep, and hence were not liable to plaintiff therefor in assumpsit.

(For other cases, see Money Received, Cent. Dig. §§ 15, 21-27; Dec. Dig. § 6.)

Appeal from the Circuit Court, Jackson County; W. O. Thomas, Judge.

Suit by Harry Walmsley against A. C. Stowell and another. Judgment for defendants, and plaintiff appeals. Affirmed.

J. H. Bremerman, of Kansas City, for Appellant.
H. L. Green, of Kansas City, for Respondents.

* Decision rendered, Oct. 6, 1913. 160 S. W. Rep. 62.

MILLVILLE AERIE NO. 1836, FRATERNAL ORDER OF EAGLES *vs.* WEATHERBY ET AL.*

(Court of Chancery of New Jersey.)

1. VENDOR AND PURCHASER—TAXES ACCRUING AFTER CONTRACT.

Taxes accruing after a contract of sale but before the conveyance of the land must be paid by the party in possession.

(For other cases, see Vendor and Purchaser, Cent. Dig. §§ 408-412; Dec. Dig. § 198.)

2. TAXATION—PAYMENT BY VENDOR—RECOVERY FROM VENDEE—VOLUNTARY PAYMENT.

Where the purchaser of land went into possession when the contract was executed, and from that time enjoyed the rents of the property, the payment by the vendor of taxes accruing after the purchaser went into possession and before conveyance, it appearing that the purchaser had refused to pay them, is not voluntary, for the vendor might pay them to protect the title, and charge the amount so paid to the vendee.

(For other cases, see Taxation, Cent. Dig. §§ 986, 987; Dec. Dig. § 531.)

3. VENDOR AND PURCHASER—TAXES—STATUTES.

P. L. 1903, p. 424, § 46, permitting a tenant to recover the amount of taxes paid from his landlord, does not modify the rule requiring a vendee in possession under a contract of sale to pay the taxes accruing during that period.

(For other cases, see Vendor and Purchaser, Cent. Dig. §§ 408-412; Dec. Dig. § 198.)

4. INSURANCE—RIGHT TO PROCEEDS—VENDOR OR PURCHASER.

A purchaser under a valid contract becomes the equitable owner of the land, the vendor retaining the legal title simply as trustee and as security for the unpaid purchase money, and as such equitable owner the purchaser is entitled to the proceeds from policies of insurance on the property.

(For other cases, see Insurance, Cent. Dig. §§ 1439-1443; Dec. Dig. § 580.)

5. VENDOR AND PURCHASER—CONTRACTS OF PURCHASE—LIABILITY OF VENDEE.

Where the purchaser of property, subject to a mortgage, entered into possession before conveyance, the contract providing that the purchaser might assume a mortgage as a part payment, and that, in case it or any amount due is demanded by the mortgagee, then the amount of the mortgage is to be secured by a purchase-money mortgage from the purchaser to the vendor, the vendor having insured the property and paid the premiums because the mortgagee threatened to foreclose in case it was not done, is not entitled to recover the amount of the premiums from the purchaser; it appearing that the insurance was taken out for the vendor's benefit, and that the purchaser was given no option as to whether he desired it or not.

(For other cases, see Vendor and Purchaser, Cent. Dig. § 1440; Dec. Dig. § 199.)

* Decision rendered. Oct. 24, 1913. 88 Atl. Rep. 847.

6. COSTS—RIGHT TO COSTS—RELIEF.

Where the complainant, who was a vendor of land, sought to compel the vendee not only to pay taxes which accrued after he went into possession and before the contract was consummated, but to require him to pay insurance premiums, and was successful only as to the taxes, costs should be allowed neither party.

(For other cases, see Costs, Cent. Dig. § 272; Dec. Dig. § 61.)

Bill by the Millville Aerie No. 1836, Fraternal Order of Eagles, against Benjamin N. Weatherby and others. Decree awarding plaintiff only part of the relief prayed.

Joseph F. Smith, of Millville, for Complainant.

Joseph H. Powell, of Bridgeton, for Defendants.



SERGEANT vs. GOLDSMITH DRY GOODS CO. ET AL.*

(Court of Civil Appeals of Texas. Dallas.)

1. INSURANCE—CONSTRUCTION OF CONTRACT—STATUS OF MEMBERS—PAPERS TO BE CONSIDERED.

While the plan of an unincorporated insurance association, as disclosed by the application for membership and the contract of insurance entered into by the members with each other, cannot affect third persons, yet in fixing the legal status of its members such plan may be examined to ascertain the nature of the association.

(For other cases, see Insurance, Cent. Dig. § 1824; Dec. Dig. § 687.)

2. INSURANCE—MUTUAL BENEFIT INSURANCE—NATURE AND STATUS.

Where the plan of an unincorporated insurance association provided that each member should make a cash deposit from which to pay losses, the unexpended portion to be returned to the member at the expiration of his policy, the expectation being that the members would thereby secure a cheaper insurance, while the plan contemplated mutual fire protection, it was also for mutual profit and advantage and not merely for benevolent, charitable, etc., purposes, though the plan contemplated the nonaccumulation of profits.

(For other cases, see Insurance, Cent. Dig. § 1824; Dec. Dig. § 687.)

3. INSURANCE—MUTUAL BENEFIT INSURANCE—LIABILITY OF MEMBERS TO THIRD PERSONS.

The members of an unincorporated insurance association, operating under a plan whereby members make a deposit from which to pay losses and the business is run by a manager, the object being cheaper insurance, are liable for any debts incurred during their period of membership, and any agreement between the members limiting their

* Decision rendered, June 28, 1913. Rehearing denied, Oct. 18, 1913.
159 S. W. Rep. 1036.

liability would no more affect third persons than a similar agreement in an ordinary partnership.

(For other cases, see Insurance, Cent. Dig. §§ 1834, 1835; Dec. Dig. § 694.)

4. INSURANCE—MUTUAL BENEFIT INSURANCE—RIGHTS OF MEMBERS AS TO EACH OTHER.

The rights and liabilities of the members of an unincorporated mutual benefit insurance association, as between themselves, are governed by the provisions of the application for insurance and the policy contract issued thereon.

(For other cases, see Insurance, Cent. Dig. §§ 1834, 1835; Dec. Dig. § 694.)

5. INSURANCE—MUTUAL BENEFIT INSURANCE—CONSTRUCTION OF CONTRACT—LIABILITY OF MEMBERS FOR LOSSES—LLOYD'S INSURANCE.

The members of an unincorporated mutual benefit insurance association, the losses of which are ordinarily paid from deposits made by the members, but the policies of which provide that the members agree to pay any loss in the proportion that the amount of their deposits bear to the total deposits, are liable upon such policies in that proportion; such plan being different from Lloyd's insurance, where policies are issued to third persons as well as members and losses are paid from a trust fund contributed by the members.

(For other cases, see Insurance, Dec. Dig. § 735.)

6. INSURANCE—MUTUAL BENEFIT INSURANCE—LIABILITY OF MEMBERS FOR LOSSES—CORPORATIONS AS MEMBERS.

The liability of the members of an unincorporated mutual benefit insurance association for losses, under a plan whereby a manager was appointed to carry on the business, the losses being payable by the members, is based on the principle of agency, and a corporation cannot escape liability on the ground that it could not become a member of a partnership, for, while the liability is similar to the liability of partners, the arrangement did not constitute a copartnership.

(For other cases, see Insurance, Cent. Dig. §§ 1834, 1835; Dec. Dig. § 694.)

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Suit by George Sergeant, as receiver of and trustee for creditors of the Commercial Underwriters, against the Goldsmith Dry Goods Company and others to charge the defendants, as members of the unincorporated association known as the Commercial Underwriters, with personal liability for its debts. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Meador & Davis, of Dallas, for Appellant.

Madden, Trulove & Kimbrough, of Amarillo, and Read & Lowrance, and Spence, Knight, Baker & Harris, all of Dallas, for Appellees.

HOME FIRE INS. CO. vs. WILSON ET AL.*

(Supreme Court of Arkansas.)

1. TRIAL—DIRECTION OF VERDICT—EFFECT OF MOTIONS BY BOTH PARTIES.

Where each of the parties requests a peremptory instruction in his favor, and requests no other instruction, they in effect agree that the issue should be decided by the court, and the court's finding has the same effect as the verdict of a jury.

(For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. § 177.)

2. APPEAL AND ERROR—REVIEW—FINDINGS OF COURT—CONSIDERATION OF EVIDENCE.

In reviewing the decision of the trial court upon motions by both parties for a peremptory instruction, the evidence is to be given its highest probative value in support of the decision.

(For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.)

3. INSURANCE—WAIVER OF AVOIDANCE OF POLICY—VACANCY OF PREMISES.

The promise of the local agent of the insurer to keep the property insured was not a waiver of the provision regarding nonliability after vacancy for ten days, nor did it estop the insurer to deny that a vacancy permit had been issued, though the agent knew when the premises became vacant and had authority to issue such a permit, subject to approval by the insurer.

(For other cases, see Insurance, Cent. Dig. §§ 1026, 1027, 1030, 1035, 1040, 1057; Dec. Dig. § 388.)

4. INSURANCE—WAIVER OF PROVISIONS OF POLICY—VACANCY OF PREMISES.

Mere knowledge of the insurer's agent that the property is vacant, and has been for a longer period than that permitted by the policy, is not a waiver of that provision of the policy, though no attempt is made to cancel it on that account.

(For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. § 378.)

5. INSURANCE—WAIVER OF PROVISIONS OF POLICY—IMPLIED WAIVER—ISSUANCE OF POLICY—KNOWLEDGE OF FACTS.

While evidence may not be received to explain or vary the terms of a written insurance policy, its provisions are waived if the agent issues a policy with knowledge that the premises are vacant, or of the existence of other conditions contracted against by the terms of the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1028-1031; Dec. Dig. § 389.)

6. INSURANCE—WAIVER OF PROVISIONS OF POLICY—NEGLECT OF INSURER'S AGENT.

Where an insured advises the insurer's agent of a condition which would work a forfeiture if not waived, yet one which could and would be waived upon the doing of some act by the agent, which the insured

* Decision rendered, July 7, 1913. 159 S. W. Rep. 1113.

assumes in reliance upon the agent's promises has been or will be done, the neglect of the agent to do the act does not invalidate the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1026, 1027, 1030, 1035, 1040, 1057; Dec. Dig. § 388.)

7. INSURANCE—WAIVER OF PROVISIONS OF POLICY—EXECUTORY AGREEMENT TO WAIVE.

An oral executory agreement of the insurer's agent to waive future breaches of the conditions of the policy, if any should occur, is not enforceable, for such an agreement is not a waiver of the effect of an existing condition, but constitutes an amendment of the written contract of insurance.

(For other cases, see Insurance, Cent. Dig. § 1018; Dec. Dig. § 383.)

8. INSURANCE—WAIVER OF PROVISIONS OF POLICY—FAILURE TO RETURN UNEARNED PREMIUM.

Where a policy is issued and the premium paid, and afterwards provisions of the policy are violated so as to relieve the insurer from liability, the insurer does not waive the breach by merely failing to return the unearned premium before suit is brought on the policy, nor is it estopped from setting up the breach.

(For other cases, see Insurance, Cent. Dig. §§ 1041-1056, 1058-1070; Dec. Dig. § 392.)

Appeal from Circuit Court, Columbia County; Geo. W. Hays, Judge.

Action by J. B. Wilson and another against the Home Fire Insurance Company. From a judgment for plaintiffs, the defendant appeals. Reversed and remanded.

T. D. Wynne and H. T. Harrison, both of Fordyce, for Appellant.

C. W. McKay, of Magnolia, for Appellee.



MUTUAL FIRE INS. CO. *vs.* TURNER.*

(Supreme Court of Appeals of Virginia.)

I. INSURANCE—FIRE INSURANCE—MUTUAL COMPANIES—NOTICE OF ASSESSMENT.

Where the charter of a mutual assessment fire company, which was made a part of the contract between the parties, provided that each member of the association should be notified of the assessment at least thirty days before the last day of payment by mailing such notice to the postoffice address given by the member in the application for insurance and that in case of change of address the member should in writing furnish the secretary with his new address, and the insured, who was not then living at her old address, had not notified

* Decision rendered, Nov. 20, 1913. 79 S. E. Rep. 1067.

the secretary of any change, the fact that the company sent the notice, which it had previously sent on postcards that might be forwarded, in an unsealed letter which could not be forwarded, and for that reason it was not received, will not relieve insured from a forfeiture of her policy because of nonpayment of assessments.

(For other cases, see Insurance, Cent. Dig. §§ 427-429, 433, 434; Dec. Dig. § 195.)

2. INSURANCE—FIRE INSURANCE—WAIVER.

Where the charter of a mutual fire insurance company merely required it to give notice of assessments by mail, the fact that for the past two years it had given notice by postcard is not a waiver of its right to give notice by second-class mail which cannot be forwarded as a postal.

(For other cases, see Insurance, Cent. Dig. §§ 427-429, 433, 434; Dec. Dig. § 195.)

3. INSURANCE—ACTION—I N S T R U C T I O N S—FORM OF INSTRUCTIONS.

In an action against a mutual assessment fire company where it was contended that the method of giving notice of assessment to the insured was not proper, the instructions should submit the issue in that form and not whether the notice should have been given in the manner previously followed.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1771-1784; Dec. Dig. § 669.)

4. INSURANCE—FIRE INSURANCE—A C T I O N S—INSTRUCTIONS.

In an action against a mutual assessment fire company, instructions requested by defendant on the necessity for the insurer to give notice of assessment held correct and improperly refused.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1771-1784; Dec. Dig. § 669.)

5. INSURANCE—FIRE I N S U R A N C E—WAIVER OF FORFEITURE.

Where a mutual assessment fire company reinstated insured's policy after default in payment of assessments, the reinstatement which came after the insured had discharged a lien on the premises is a waiver of the original ground of forfeiture on account of the lien.

(For other cases, see Insurance, Cent. Dig. §§ 1041-1056, 1058-1070; Dec. Dig. § 392.)

6. EVIDENCE—PAROL EVIDENCE TO VARY WRITTEN INSTRUMENTS—ADMISSIBILITY.

In an action on a fire policy, parol evidence that the written application did not contain some of the terms found therein at the time the insured's agent signed it is inadmissible, being an attempt to vary a written instrument by parol evidence.

(For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.)

Error to Circuit Court, Clarke County.

Action by Harriot S. Turner against the Mutual Fire Insurance Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

A. Moore, Jr., of Berryville, Edward Nichols, of Leesburg, and Moore, Barbour, Keith & McCandlish, of Fairfax, for Plaintiff in Error.

Ward & Lerrick, of Winchester, and F. B. Whiting, of Berryville, for Defendant in Error.



PROVIDENCE WASHINGTON INS. CO OF PROVIDENCE,
R. I., *vs.* YOUMANS.*

(Supreme Court of New York, Appellate Term, First Department)

1. INSURANCE—SUBROGATION.

Under a tourist fire insurance policy providing that, if the insured acquired a right of action for damage to the property covered, he should assign or transfer it to the insurer upon payment of loss, the insurer who did not show that payment to insured by a hotel was for loss by fire, was not entitled to subrogation.

(For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. (Dig. § 606.)

2. NEW TRIAL—JUDGMENT—EXCESSIVE DAMAGES—SUBROGATION.

Where insured, defending an action by the insurer for subrogation to an amount received by him from a hotel for loss by fire, offered to pay over \$150, the difference between the total amount received and the amount of his total claim, and also offered evidence to show a loss larger than the total claim, he was entitled to a new trial upon judgment for \$280, unless the excess over \$150 was remitted.

(For other cases, see New Trial, Cent. Dig. §§ 153-156; Dec. Dig. § 76.)

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by the Providence Washington Insurance Company of Providence, R. I., against Ephraim M. Youmans. From a judgment for plaintiff after trial by the court without a jury, defendant appeals. Reversed, and new trial granted, unless plaintiff agreed to reduce the amount of the judgment to \$150.

Argued October term, 1913, before Seabury, Guy, and Bi-jur, JJ.

Chester H. Lane, of New York City, for Appellant.

James J. Macklin, of New York City (Henry M. Dater, of New York City, of counsel), for Respondent.

* Decision rendered, Nov. 13, 1913. 143 N. Y. Supp. 941.

SHAWNEE MUT. FIRE INS. CO. vs. McCLURE ET AL.*

(Supreme Court of Oklahoma.)

1. INSURANCE—CONTRACT—WHAT CONSTITUTES.

On October 11, 1909, M. executed and delivered to C., a soliciting agent, an application to an insurance company for certain insurance against loss by fire. The agent had the limited authority "to solicit said application * * * receive same, together with settlement of premium, investigate property to be insured, prepare diagram, make survey, recommend risk and forward same to the defendant company for acceptance or rejection, but did not have authority to issue policies of insurance." The agent gave a receipt for the application and premium, which provided "all of which are to be returned if policy be not issued." The application was forwarded from Bennington, Okla., to Shawnee, Okla., and was received by the company on October 15, 1909. Upon receipt the company immediately wrote to the agent at Bennington, asking information as to certain other insurance on the same property disclosed in the application. The property burned October 17, 1909, before a reply to its letter had been received. After the fire the application was rejected, and a return of premium offered, which was refused. *Held*, that there was no contract of insurance, and no liability on the part of the insurance company on account of the loss of the property.

(For other cases, see Insurance, Cent. Dig. §§ 195-202; Dec. Dig. § 130.)

2. INSURANCE—CONTRACT—WHAT CONSTITUTES—ACCEPTANCE.

The making of an application for insurance, subject to the approval or rejection of the company to which it is made, is merely a step in the creation of a contract to insure. When the application is made out and forwarded to the company, it is not yet a contract of insurance; it has then only attained the position of a proposition on one side. It requires an acceptance by the other side before it can be said that the minds of the parties have met upon the terms of a contract to insure.

(For other cases, see Insurance, Cent. Dig. §§ 195-202; Dec. Dig. § 130.)

3. INSURANCE — CONTRACT — ESSENTIALS — "CONTRACT OF INSURANCE."

To constitute a binding "contract of insurance," there must be a meeting of the minds of parties with authority to contract as to the premises and the risk, the amount insured, the term the insurance is to continue, and the amount of the premium.

(For other cases, see Insurance, Cent. Dig. §§ 172, 178; Dec. Dig. § 124.)

(For other definitions, see Words and Phrases, vol. 2, p. 1531.)

Commissioner's Opinion, Division No. 2. Error from District Court, Bryan County; Jas R. Armstrong, Judge.

Action by N. B. McClure and another, against the Shawnee Mutual Fire Insurance Company, a corporation. Judgment for plaintiffs, and defendant brings error. Reversed and dismissed.

* Decision rendered, June 19, 1913. 135 Pac. Rep. 1150. Syllabus by the Court.

Standard, Wahl & Ennis, of Shawnee, for Plaintiff in Error.
McPherren & Cochran, and Chas. P. Abbott, all of Durant,
for Defendants in Error.

JOHNS vs. ARIZONA FIRE INS. CO. ET AL.*

(Supreme Court of Washington.)

1. APPEAL AND ERROR—REVIEW—TRIAL DE NOVO.

On a trial de novo in the Supreme Court, findings of the trial court will be given great weight, and if based on conflicting evidence will not be disturbed unless clearly against the weight of the evidence.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3645-3648; Dec. Dig. § 895.)

2. INSURANCE—AGENT FOR CORPORATION—TRANSACTION OF BUSINESS—SECRET PROFIT—EVIDENCE.

Evidence *held* to warrant a finding that defendant B., while secretary and general manager of a fire insurance company that was in financial difficulties, in reinsuring its risks in another company, obtained from the latter a secret profit of 10 per cent on the unearned premiums for carrying out the deal, and that such commission was in compensation for services thereafter to be rendered to the reinsurer in establishing the latter in Washington and looking after the risks.

(For other cases, see Insurance, Cent. Dig. § 40; Dec. Dig. § 35.)

3. EVIDENCE—DECLARATIONS OF THIRD PERSON.

Where in an action against the former secretary and general manager of an insolvent insurance company to recover an alleged secret profit, alleged to have been received and fraudulently retained by him in reinsuring the company's unexpired policies in another company, he admitted that he was to receive 10 per cent of the unearned premiums, and such fact was never disclosed to the officers of his company, declarations of the secretary and general manager of the reinsuring company with reference to the contract were admissible as bearing on the nature of the transaction, though in the absence of the secretary of the company whose risks were reinsured.

(For other cases, see Evidence, Cent. Dig. §§ 994-1002; Dec. Dig. § 253.)

4. INSURANCE—INSURANCE COMPANIES—ACTS OF OFFICER—SECRET PROFIT—RECOVERY.

Where the secretary and general manager of an insurance company in financial straits obtained a contract with another company, reinsuring his company's risks prior to a receivership, and in so doing occupied a position of trust and confidence, and the reinsuring company, with knowledge of the facts, paid him a secret commission for obtaining the contract for which he did not account, both he and the reinsuring company were liable therefor to the receiver of the company whose risks were reinsured.

(For other cases, see Insurance, Cent. Dig. § 40; Dec. Dig. § 35.)

* Decision rendered, Nov. 3, 1913. 136 Pac. Rep. 120.

Department 2. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Action by Joseph Johns, as receiver of the Pioneer Fire Insurance Company, against the Arizona Fire Insurance Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Van Dyke & Thomas, Higgins & Hughes, and Hyman Zettler, all of Seattle, for Appellants.

Burkey, O'Brien & Burkey, of Tacoma, for Respondent.



GERMAN-AMERICAN INS. CO. *vs.* MESSENGER.*

(Court of Appeals of Colorado.)

1. INSURANCE—CONSTRUCTION OF CONTRACT—PROPERTY COVERED.

In an action on a fire insurance policy on the stock of a farm implement business, including that in the building and additions adjoining, and that "in yard, and on platforms in rear and alley adjoining" the building, it appeared that insured had no yard room immediately adjoining his building or anywhere except a vacant lot diagonally across the street, and that he offered to go over with the insurer's agent and look at the goods there, but the agent said he knew what was there, for which reason they did not go. *Held*, that a grain separator standing on the vacant lot was included in the policy.

(For other cases, see Insurance, Cent. Dig. § 351; Dec. Dig. § 165.)

2. INSURANCE—CONSTRUCTION OF CONTRACT.

A contract of fire insurance is one of indemnity, and where loss occurs thereunder it will be given the construction which is most probable and natural under the circumstances, so as to attain the object the parties had in making it.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

3. APPEAL AND ERROR—LAW OF CASE.

The decision of the Supreme Court on a former appeal as to the admissibility of evidence, so far as applicable, becomes the law of the case on a subsequent appeal to the Court of Appeals.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.)

Appeal from District Court, Denver County; Greeley W. Whitford, Judge.

Action by K. E. Messenger against the German-American Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

* Decision rendered, Nov 10, 1913. 136 Pac. Rep. 478.

Sylvester G. Williams, of Denver, for Appellant.
John R. Smith, and H. B. Woods, both of Denver, for Ap-
pellée.

**WARREN vs. FRANKLIN FIRE INS. CO. ET AL.—SAME vs.
PENNSYLVANIA FIRE INS. CO. ET AL.***

(Supreme Court of Iowa.)

1. INSURANCE—POLICY—DELIVERY TO AGENT.

Where plaintiff, having had difficulty in keeping his property insured, arranged with an insurance agent to reinsure on the expiration of policies and in case any policy was canceled, such authority was not incompatible with the agent's duty to his insurance companies, and hence, when a new policy on plaintiff's property in place of a canceled policy was handed to such agent pursuant to his authority to receive the same, from a different agency, there was a sufficient delivery to plaintiff to render it enforceable.

(For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.)

**2. INSURANCE—POLICIES—CANCELLATION—NOTICE—
WAIVER.**

Code Supp. 1907, § 1758b, provides that a fire policy shall contain a provision that it is subject to cancellation at any time at the request of the insured or by the company on five days' notice. *Held*, that the provision requiring five days' notice was for the benefit of the insured and was subject to waiver by him and was waived where he had made an insurance agent his agent to insure on expiration or cancellation of any policy, on such agent receiving within the five days a new policy in another company after receiving notice of cancellation of an existing policy on plaintiff's property, though plaintiff was not personally notified of the cancellation.

(For other cases, see Insurance, Cent. Dig. §§ 498, 499; Dec. Dig. § 228.)

Appeal from District Court, Mahaska County; B. W. Preston,
Judge.

Separate actions against the Pennsylvania Fire Insurance Company and the Franklin Fire Insurance Company were tried together. Verdict was directed in favor of the former and against the latter and judgments entered accordingly. The Franklin Fire Insurance Company appeals from judgment against it and plaintiff from that in favor of the Pennsylvania Fire Insurance Company. Affirmed.

* Decision rendered, Oct. 23, 1913. 143 N. W. Rep. 554.

C. C. Orvis, of Oskaloosa, for G. L. Warren.

Burrell & Devitt, of Oskaloosa, and Thomas Bates, of Chicago, Ill., for Pennsylvania Fire Ins. Co.

John F. & Wm. R. Lacy, of Oskaloosa, for Franklin Fire Insurance Company.

DAHROOGE ET AL. vs. ROCHESTER-GERMAN INS. CO.
OF ROCHESTER, N. Y.*
(Supreme Court of Michigan.)

1. INSURANCE—STANDARD FIRE POLICY—ACTIONS—CONTRACT LIMITATION.

The standard fire policy prescribed by Pub. Acts 1905, No. 277, requires that immediate notice of loss shall be given and proof of loss furnished within sixty days; that insured shall submit to an examination under oath, as required, and shall produce books of account, bills, invoices, etc.; that the loss shall not be payable until sixty days after notice, ascertainment estimate and satisfactory proofs of loss have been received; that no suit shall be sustainable until after full compliance by the insured with all the foregoing requirements nor unless commenced within twelve months next after the fire. *Held*, that the limitation with reference to the commencement of suit runs from the date of the fire, and cannot be extended to twelve months succeeding the sixty days from the time of furnishing proofs of loss, etc.

(For other cases, see Insurance, Cent. Dig. §§ 1540, 1544-1550; Dec. Dig. § 622.)

2. ESTOPPEL—NATURE—“WAIVER”—“ESTOPPEL.”

A “waiver” is a voluntary relinquishment of a known right, while “estoppel” is based on some misleading conduct or language of one person which, being relied on, operates to the prejudice of another, and is applied to the wrongdoer by the court in denial of some right which otherwise might exist to prevent a fraud. In insurance cases the terms are used interchangeably, and it is sometimes expressed as “waiver by estoppel.”

(For other cases, see Estoppel, Cent. Dig. §§ 121-125, 127; Dec. Dig. § 52.)

(For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381, 7831, 7832; vol. 3, pp. 2494-2496; vol. 8, p. 7654.)

3. INSURANCE—FIRE POLICY—CONTRACT LIMITATION—ESTOPPEL.

Plaintiff sustained a fire loss October 14, 1910. In January, 1911, he was fully examined, and proofs of loss had been fully furnished. Attempts to secure payment and threats of suit were made until July following, when plaintiff brought suit in August. Another suit was instituted before October 14, 1911, when the year expired within which suit could be brought under the terms of the policy, but both

* Decision rendered, Nov. 3, 1913. 143 N. W. Rep. 608.

failed, and a third action was instituted January 27, 1912. *Held*, that the insurer was not estopped to urge the contract limitation as a bar to the latter suit.

(For other cases, see Insurance, Cent. Dig. §§ 1540, 1544-1550; Dec. Dig. § 622.)

Bird, J., dissenting.

Error to Circuit Court, Kent County; Willis B. Perkins, Judge.

Action by George Dahrooge and another against the Rochester-German Insurance Company of Rochester, N. Y. Judgment for defendant, and plaintiff brings error. Affirmed.

Argued before Steere, C. J., and Moore, McAlvay, Brooke, Kuhn, Stone, Ostrander, and Bird, JJ.

Powers & Eardley, of Grand Rapids, for Appellants.

Norris, McPherson & Harrington, of Grand Rapids, for Appellee.



LINGLEBACH *vs.* THERESA VILLAGE MUT. FIRE INS. CO.*

(Supreme Court of Wisconsin.)

1. APPEAL AND ERROR—FINDINGS—REVIEW.

Where the proof on an issue of fact presents a jury question, the verdict confirmed by the trial court will not be set aside on appeal unless the evidence leaves no reasonable ground on which the verdict may rest after giving due effect to the superior advantages of the trial court for reaching a correct conclusion.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.)

2. INSURANCE—PROOFS OF LOSS—WAIVER.

Where an insurance company, on being notified of a loss, immediately took the position that the policy was not in force at the time of the fire by reason of circumstances rendering operative the forfeiture clause relating to a change of interest in the insured property, the provision requiring proofs of loss was waived.

(For other cases, see Insurance, Cent. Dig. §§ 1391, 1392; Dec. Dig. § 559.)

3. INSURANCE—FORFEITURE—CHANGE OF INTEREST—BAILMENT—“CHANGE OF POSSESSION.”

Mere leaving of insured personal property in the building where insured, in the custody of an occupant whose tenancy commenced after the date of the insurance, and who was without any control over the

* Decision rendered, Oct 28, 1913. 143 N. W. Rep. 688.

property otherwise than to hold it subject to the order of the assured, did not constitute a "change of possession," within a provision that the policy should be void if there was any change in the interest, title, or possession of the subject of the insurance other than by death of the insured, except a change of occupants without an increase of the hazard, etc.

(For other cases, see Insurance, Cent. Dig. §§ 794-822, 825; Dec. Dig. § 328.)

Appeal from Circuit Court, Marinette County; William B. Quinlan, Judge.

Action to recover on an insurance policy for loss, by fire, of certain personal property. The defendant denied liability. There was a conflict of evidence as to whether the assured owned the subject of the loss at the time of the fire; also as to whether proofs of loss were delivered to defendant. The loss was payable to a mortgagee as his interest might appear. The claim for loss was duly assigned to the mortgagee, and he commenced the action therefor, and prosecuted the same to judgment. The jury found, especially, in favor of plaintiff as regards ownership of the property and delivery of proofs of loss. The property was insured while in the building where located at the date of the insurance. There was evidence tending to prove that the assured, prior to the fire, turned the place of business where the property was situated over to another, and left it with the latter as bailee until it was destroyed. The policy was in the standard form, containing the provision that: "This entire policy * * * shall be void if * * * any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured or otherwise." There was a change of possession of the building where the property was situated when insured, and where it was to remain during the life of the policy. The court held that, as matter of law, there was no change of possession within the quoted provisions of the policy, and rendered judgment for plaintiff upon the verdict.

Husting & Husting, of Mayville, for Appellant.
Classon & O'Kelliher, of Oconto, for Respondent.

**KIMBALL vs. LOWER COLUMBIA FIRE RELIEF ASS'N
OR OREGON, ET AL.***

(Supreme Court of Oregon.)

1. APPEAL AND ERROR—PRESUMPTIONS IN SUPPORT OF JUDGMENT.

Where, in a suit to enforce an insurance contract, it appeared that the contract and the insurer's by-laws were made exhibits to the complaint and a part thereof, but they were omitted from the abstract and transcript, it would be presumed on defendant's appeal that they supported the allegations of the complaint.

(For other cases, see Appeal and Error, Cent. Dig. § 3777-3781, 3782; Dec. Dig. § 934.)

2. ASSOCIATIONS—ACTIONS—PARTIES.

In the absence of an enabling statute, a voluntary association has no legal existence and cannot be sued by its association name, and suits must be brought against the persons composing it individually.

(For other cases, see Associations, Cent. Dig. §§ 36-43; Dec. Dig. § 20.)

3. INSURANCE—ACTIONS ON POLICIES—FORM OF REMEDY.

Under a policy issued by a voluntary insurance association which provided that, in case of loss, it would, through the agency of its board of directors, levy an assessment for the purpose of paying such loss, a suit in equity could be maintained to compel the officers of the association to levy such assessment for the purpose of paying a loss duly proved and adjusted.

(For other cases, see Insurance, Cent. Dig. § 416; Dec. Dig. § 191.)

4. INSURANCE—ACTIONS AGAINST—PARTIES.

In a suit against the officers of a voluntary insurance association to compel them to levy an assessment for the purpose of paying a loss as provided by the insurance contract, the members of the association were not necessary parties; it not appearing that they refused or objected to the paying of the claim.

(For other cases, see Insurance, Cent. Dig. § 416; Dec. Dig. § 191.)

5. INSURANCE—ACTIONS—EXTENT OF RELIEF.

In a suit against the officers of a voluntary insurance association to compel them to levy an assessment for the purpose of paying a loss, as provided by the contract, in which the association by name was made a defendant, a judgment against it for the amount due could not be rendered; the association not being properly in the court.

(For other cases, see Insurance, Cent. Dig. § 416; Dec. Dig. § 191.)

Department 2. Appeal from Circuit Court, Marion County;
Wm. Galloway, Judge.

Suit in equity by E. M. Kimball against the Lower Columbia Fire Relief Association of Oregon and others. From a decree granting the relief prayed for, defendant appeals. Modified, and decree entered for plaintiff.

Geo. P. Lent, of Portland, for Appellants.

William H. Trindle, of Salem, for Respondent.

* Decision rendered, Oct. 21, 1913. 135 Pac. Rep. 877.

ACCIDENT AND HEALTH.

SUPREME COURT OF IOWA.

ALLEN

vs.

TRAVELERS' PROTECTIVE ASS'N OF AMERICA.*

1. INSURANCE—ACCIDENT INSURANCE—ACCIDENTAL DEATH.

In an action on an accident policy, a showing that deceased was killed in an affray with a burglar will establish accidental death and entitle the beneficiary to recover, unless death from such cause is exempted by the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1166-1169; Dec. Dig. § 455.)

2. INSURANCE—ACCIDENT INSURANCE—ACCIDENTAL DEATH—PRESUMPTIONS.

Where death is shown to have resulted from an external and visible injury, it will be presumed that it was not intentionally inflicted by the insured or a third person.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.)

3. INSURANCE—ACCIDENT INSURANCE—ACTIONS—BURDEN OF PROOF.

In an action on an accident policy, the presumption arising upon proof that insured met his death from an external cause, it appearing that he was shot in an affray with a burglar, makes a *prima facie* case of accidental death, and hence it is not improper to charge the jury that the insurer has the burden of proving that the injury was intentionally inflicted.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.)

4. INSURANCE—ACCIDENT INSURANCE—ACTIONS—AFFIRMATIVE DEFENSES.

an action on an accident policy providing a death benefit in case of the death of a member in good standing by accident, the insurer must plead as an affirmative defense the rule of the association exempting it from liability for intentional injuries causing death inflicted by the member or any other person, and so it has the burden of proving such defense.

(For other cases, see Insurance, Cent. Dig. §§ 1554, 1632-1644; Dec. Dig. § 645.)

5. APPEAL AND ERROR—REVIEW—HARMLESS ERROR.

In an action on a policy insuring against the accidental death of the insured, where it was conclusively shown that the death was accidental,

* Decision rendered, Oct. 25, 1913. 143 N. W. Rep. 574.

the giving of the instructions that the injury was presumably accidental was not prejudicial, even if they were abstractly erroneous.
(For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.)

6. WITNESSES—EXAMINATION—CROSS-EXAMINATION.

While courts will usually allow great latitude in the cross-examination of a party in interest, the scope of such cross-examination is largely discretionary.

(For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967-975; Dec. Dig. § 275.)

7. APPEAL AND ERROR—REVIEW—HARMLESS ERROR.

In an action on an accident policy where the beneficiary who was the insured's wife assigned it to a trustee, the insurer cannot complain that it was not allowed to cross-examine the wife at length as to the evidence connected with the death, where she was placed on the stand on rebuttal and testified in detail to those matters, over the objections of the insurer that her testimony was not proper in rebuttal.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.)

8. APPEAL AND ERROR—TRIAL—REVIEW—DISCRETION OF TRIAL COURT.

The allowance of testimony in rebuttal is largely a matter of discretion with the trial court, and only an abuse of discretion will justify interference on appeal.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. § 970; Trial, Cent. Dig. §§ 148-150; Dec. Dig. § 62.)

9. TRIAL—EVIDENCE ADMISSIBLE IN PART.

Where the plaintiff introduced in evidence allegations contained in the affirmative defenses pleaded by the defendant, the defendant, while entitled under Code, § 4615, to introduce all of that part of the answer referring to the part introduced by plaintiff, is not entitled to introduce the entire answer, so that where the offer of the entire answer was unrestricted, and part was inadmissible, the entire answer was properly excluded.

(For other cases, see Trial, Cent. Dig. §§ 92-98; Dec. Dig. § 39.)

10. INSURANCE—ACCIDENT INSURANCE—ACTIONS—JURY QUESTION.

In an action on an accident policy for the death of the insured, evidence held to present a question for the jury whether the insured was intentionally killed.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

11. TRIAL—JURY QUESTION—DIRECTED VERDICT.

A defendant who relies upon an affirmative defense and therefore has the burden of proof is not entitled to a directed verdict unless the defense is conclusively established.

(For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.)

12. INSURANCE—POLICY—CONSTRUCTION.

An ambiguous policy will be construed most strongly against the insurer.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

13. INSURANCE—ACCIDENT INSURANCE—POLICY—CONSTRUCTION.

The constitution of an accident insurance association provided that, when any member in good standing should receive accidental injuries causing disability, he should be paid a stipulated amount per week for not over one hundred and four consecutive weeks, and that an injury received by a member in an attempt to rob such member shall be considered an accident, and the association shall be liable for weekly indemnity only, not exceeding ten weeks as in case of accidental injury received in any other manner. Another section of the constitution provided that \$5,000 should be paid to the beneficiary named in the certificate of any deceased member in good standing in case of death by accident. One of the rules of the association indorsed on the back of the certificate provided that the association should not be liable for intentional injuries causing death or disability inflicted by the member or any other person upon him. *Held* that, as it would otherwise result in an inconsistency, the association is liable for death resulting from injuries inflicted intentionally upon the member by a third person in an attempt to rob him, for, while the constitution limits the number of indemnity payments in case of the disability resulting from an attempted robbery, it declares that injuries received in such an attempt shall be considered an accident.

(For other cases, see Insurance, Cent. Dig. §§ 1166-1169; Dec. Dig. § 455.)

Deemer and Ladd, JJ., dissenting.

Appeal from District Court, Linn County; Milo P. Smith, Judge.

Action upon a certificate of accident insurance issued by the defendant upon the life of John T. Carmody in favor of his wife, Mary E. Carmody, as beneficiary. The action is brought by a trustee for the beneficiary. For the purpose of our discussion, the beneficiary will be referred to as the plaintiff. There was a trial to a jury and a verdict and judgment for the plaintiff for the amount of the certificate, with interest. The defendant appeals. Affirmed.

Tourtellot & Donnelly, of Cedar Rapids, and Sullivan & Sullivan, of Des Moines, for Appellant.

Dawley & Wheeler and A. T. Cooper, all of Cedar Rapids, for Appellee.

EVANS, J.

The certificate in question provided for accident insurance only. It provided for the payment of \$5,000 in case of the death of the insured by accident. The deceased died from a gunshot wound on August 7, 1909. Such wound was inflicted upon him on May 24, 1909. He received the wound while engaged in an

encounter with a burglar in his home at about 1 o'clock in the morning. The following from appellant's brief is a sufficient preliminary statement of the circumstances attending the inflicting of the injury which resulted in the death of the insured: "That on the 7th day of August, 1909, John Thomas Carmody died by reason of injuries received at the hands of a burglar on the 24th day of May, 1909. That at the time of the injury Mr. Carmody was mayor of the city of Cedar Rapids. That on that date and about 1 to half past 1 in the morning a burglar entered the home on Fifth avenue and the sleeping room of Mr. and Mrs. Carmody. That the home of Mr. Carmody was a two-story dwelling, and he and Mrs. Carmody were sleeping in one of the upstairs rooms that had an opening into a hallway and a window leading onto a porch on Fifth avenue. The bed in which they were sleeping was a little to the side of the door entering from the hall and was so that you could pass around the foot of the bed and upon either side of it. That about 1 o'clock on the morning of the 24th cries were heard from the Carmody home appealing for help and indicating that trouble was going on in the house. Those living in close proximity rushed across and found Mr. Carmody lying upon a sofa in one of the downstairs rooms. That there was blood on his nightrobe over his stomach. Mrs. Carmody and her mother were in the room with Mr. Carmody at the time. Police arrived within a few moments and soon after Dr. Rumhl. A bullet wound was found on Mr. Carmody that went just through the outer layer of the muscle of the stomach and lodged a little above the navel. Within a short time he was taken to the hospital and remained there until his death on the 7th day of August following. Mr. Carmody stated to Mrs. Zaleska, 'The coward got me here;' and he put his hand right over the end of the rib. There was a broken jardiniere in the hall at the base of the stairway. Mrs. Carmody said she was in bed when the burglar came and as he came up to the bed she awoke and said 'Jack,' and the burglar said, 'Not another word at your peril.' That in the meantime Mr. Carmody got up and began scuffling with the burglar and Mrs. Carmody went out the window on top of the porch and screamed for help and in the meantime shooting took place. It is further shown by the undisputed testimony that quite a scuffle ensued in the bedroom while Mrs. Carmody was out on top of the porch calling for help. That Mr. Carmody grappled the burglar who was attempting to get to the stairway or Mr. Carmody was pushing out into the hall, for it is shown that while in the hall at the head of the stairs a shot occurred, and two other shots took place within a short time thereafter as the burglar was either on the stairway or descending. Marks of the bullet were found on the wall. It is unquestioned the shots fired were from a revolver in the hands of the burglar. Mr. Carmody did not have in his hands a weapon of any kind."

The defendant is a mutual association and its contract is incorporated in its constitution and by-laws and in certain printed "rules" which were indorsed upon the back of the certificate of membership. Section 2 of article 9 of the constitution provides as follows: "Sec. 2. \$5,000 shall be paid to the beneficiary named in the certificate of any deceased member *in good standing* in case of death by accident." If full effect were given to this provision according to its terms, there could be no question as to plaintiff's right of recovery.

As modifying the quoted provision, the defendant pleaded certain "rules" of the defendant association which were indorsed upon the back of the certificate of membership. These rules are as follows: "That this association shall not be liable, in case of injuries, fatal or otherwise, inflicted by a member in good standing on himself while sane or insane, or injuries of which there are no visible mark upon the body (the body itself not being deemed such a mark in case of death), or in case of injury, disability or death happening to the member while in any degree under the influence of intoxicating liquors or narcotics, or by reason of and in consequence of the use thereof, or death or disability when caused wholly or in part by any bodily or mental infirmity or disease, dueling, fighting, wrestling, war or riot, injury causing death or disability resulting from an altercation or quarrel, voluntary overexertion (unless in humane effort to save human life), voluntary or unnecessary exposure to danger or to obvious risk of injury, *or by intentional injuries causing death or disability inflicted by the member or any other person upon him*; injury causing death or disability received either while avoiding or resisting arrest, while violating the law or violating the ordinary rules of safety of transportation companies, or in case of injury fatal or otherwise, caused by disease of epilepsy, paralysis, apoplexy, sunstroke, freezing, fits, lumbago, vertigo or sleepwalking, voluntary or involuntary, conscious or unconscious inhalation of any gas or vapor, injury fatal or otherwise, resulting from any poison or infection or the result of an insect bite or sting, or from any accidentally or otherwise taken, administered, absorbed or inhaled, disease, death or disability resulting from medical or surgical treatment; operation made necessary by the particular injury for which claim is made and occurring within six calendar months from date of accident excepted."

The particular "rule" upon which defendant relied is indicated in the foregoing quotation by italics. The contention was that the injury which caused the death of the insured was *intentionally inflicted upon him by the burglar* and that the defendant was therefore not liable.

In instructing the jury, the trial court laid upon the defendant the burden of proving that the injury in question was intentionally inflicted by the burglar. It also instructed the jury that a presumption would obtain that the injury was not intentionally

inflicted unless it was otherwise made to appear from all the evidence in the case. The principal assignments of error concentrate upon the proposition here involved.

1. Appellant's first complaint is that the trial court erred in its instructions in putting upon the defendant the burden of proving that the injury in question was intentionally inflicted by the burglar.

[1] It appears conclusively from the evidence on both sides that the injury was not inflicted by Carmody himself. The injury therefore was accidental as to Carmody, even though it were intentional on the part of the burglar. This is the uniform holding of the authorities. *Jones vs. U. S. Mutual*, 92 Iowa, 652, 61 N. W. 485; *Hutchcraft vs. Insurance Company*, 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484; *Button vs. Association*, 92 Wis. 83, 65 N. W. 861, 53 Am. St. Rep. 900.

If we could ignore the exceptions enumerated in the "rules" as above quoted, there could be no doubt of the plaintiff's right of recovery as for death resulting from accidental injury. *Jones vs. U. S. Mutual*, *supra*. If the plaintiff must fail, it is not because she has failed to show that the death resulted from accident, but because by the terms of the insurance contract such accident was excepted from its operation. Under the "rules," not *all* accidental injuries are insured against. The exceptions are enumerated. These exceptions relate mainly, not to the nature or form of particular injuries, but to the immediate circumstances attending the infliction of the injury. For instance, accidental injuries occurring while the insured is under the influence of intoxicating liquors or while wrestling are excepted from the operation of the policy. In such a case it would not be necessary for the defendant to deny the accidental character of the injuries. It would be a sufficient defense to show that they occurred under circumstances excepted by the policy. So in the case before us. Even though the injury was accidental as to the insured, yet, if it was intentionally inflicted by the burglar, it was excepted from the operation of the policy, and the trial court so instructed the jury. Was the burden properly laid upon the defendant to show that the injury in question was intentionally inflicted?

[2] We have heretofore held that, where death is shown to have resulted from an external and visible injury, a presumption will obtain that it was not intentionally inflicted either by the insured or by another person. *Caldwell vs. Association*, 136 N. W. 678; *Taylor vs. Association*, 110 Iowa, 621, 82 N. W. 326; *Carnes vs. Association*, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. Rep. 306; *Jones vs. U. S. Mutual Association*, 92 Iowa, 652, 61 N. W. 485.

[3] It is perhaps inaccurate in a verbal sense to say that the burden of proving any fact rests upon the defendant unless such alleged fact is a part of his affirmative defense. If a presumption

obtains in favor of plaintiff, he may support it with additional evidence if he can or he may take the risk of resting upon his prima facie case. A prima facie case is not necessarily a strong case, and it may be lost before a jury. The presumption in plaintiff's favor is one of fact and is not conclusive as a matter of law. He is entitled to the benefit of it in so far as it is not overcome by the other evidence in the case. It matters not whether such other evidence comes from one side or from the other. In this case the plaintiff made a prima facie case and rested without introducing any evidence of the immediate circumstances of the infliction of the injury. The defendant properly entered fully into such circumstances with its evidence. Looking at the question, therefore, in a negative and defensive sense alone, it was not misleading to say that the burden was on the defendant to show that the injury was intentionally inflicted.

[4] But the defendant in this case pleaded this provision of the "rules" as a separate and affirmative defense. If this provision was properly pleaded as an affirmative defense, necessarily the burden of proving it rested upon the pleader.

There is the further consideration that the proviso pleaded was in the nature of an exception to the general provisions of the constitution which purported on their face to cover *all* accident insurance. It devolved upon the defendant to plead and to prove that the accidental injury, from which the insured died, came within such exception. If it devolved upon the plaintiff in the first instance to traverse such exception and to prove the negative, it would likewise devolve upon her to do the same as to the entire enumeration contained in the "rules" above quoted. We think, therefore, that the proviso under consideration should be deemed as in the nature of an exception and that the general rule of pleading and proof in such cases should obtain. This was our holding in *Payne vs. Frat. Accident Ass'n*, 119 Iowa, 342, 92 N. W. 361, and *Jones vs. U. S. Mutual Ins. Co.*, *supra*.

[5] The fact that the accidental character of the injury as to Carmody is conclusively shown, from the evidence on both sides, renders it unnecessary that we consider the instructions of the court to the effect that such injury was *presumptively* accidental. Such instructions could not be prejudicial to defendant, upon this record, even if they were abstractly erroneous.

[6, 8] 2. Complaint is made by appellant because it was not permitted to cross-examine the witness, Mary Carmody, the beneficiary, to the extent desired. The attempted cross-examination is set forth fully in the record. We need not include it here. There was some technical maneuvering on the part of counsel on each side in an effort to avoid assuming a greater burden of proof than was legally necessary. The defendant's answer pleaded a general denial and certain separate affirmative defenses.

Mary Carmody was sworn as a witness for the plaintiff. Her testimony in chief was confined strictly to a statement of the date of the injury of her husband and the date of his death and to the identification of her signature transferring her cause of action to the plaintiff trustee. Thereupon, by a series of questions on cross-examination, the defendant attempted to inquire into the details of circumstances of the night of May 24th. Objection was made to such a line of examination as not proper cross-examination, and the objection was sustained. The ruling was strictly proper. It is true, as contended, that courts will usually allow large latitude to the cross-examination of a party in interest. But this also is discretionary with the trial court. This witness was placed upon the stand again on rebuttal by plaintiff, and the whole subject was fully covered, and full opportunity for cross-examination was given. Objection, however, was made by defendant to all such examination as not proper rebuttal, and complaint is now made of adverse ruling of the trial court on such objections. It is impossible for the defendant to maintain its grievance at both ends. In the presence of the later opportunity for cross-examination, it is not in a position to complain of being deprived of such opportunity in the first instance. We think that such evidence was properly admitted in rebuttal. In any event, such question is so largely a matter of discretion with the trial court that only an abuse of discretion would justify interference on our part.

[9] 3. For the purpose of proving her case as against the general denial, the plaintiff introduced in evidence certain allegations contained in some of the affirmative defenses pleaded by the defendant. Thereupon, as in the nature of a cross-examination, the defendant offered in evidence its whole pleading, and this was objected to by the plaintiff, and the objection was sustained. Defendant's contention is that, inasmuch as the plaintiff had introduced in evidence a part of its answer, it was entitled to introduce the whole. It was entitled to introduce so much of its answer as related to the same subject. Code, § 4615. The defendant's offer was unrestricted and included matter clearly inadmissible. It was therefore properly rejected. .

[10, 11] 4. It is urged by appellant that a verdict should have been directed in its favor on the evidence as a whole on the ground that it conclusively appeared that the injury from which Carmody died was intentionally inflicted by the burglar. On first impression it would seem uncandid to say that the victim of a burglary, shot by the burglar in an encounter, was not intentionally injured; and yet we think it must be said upon this whole record that circumstances are made to appear which fairly tend to show an intent to avoid personal injury on the part of the burglar. The theory of the plaintiff is that he shot only to frighten Carmody and to make his escape. The evidence would warrant a finding that, after the shot which took effect, he shot

twice over the head of Carmody when he was within a few feet of him, backing downstairs, and when he could not have failed to inflict further injury upon him if he had tried to do so. In this respect, the case is quite as strong for the plaintiff as was the case of Jones vs. U. S. Mutual Association, *supra*. It is much stronger than the case of Railway Accident Association vs. Drummond, 56 Neb. 235, 76 N. W. 562. The defendant's defense rested at this point wholly upon the question of the *intent* of the burglar. Such intent could be ascertained only by inference from the circumstances shown. The question of intent is usually and peculiarly a jury question. Even the legal presumptions which might obtain as against the burglar would not necessarily obtain against Carmody or the beneficiary of his insurance. If the burden of proof were on the plaintiff as to such intent, a different question would be presented at this point. Inasmuch as the burden was upon the defendant, a verdict could not be directed in its favor without holding that it had proved the intent affirmatively and conclusively. It is the exceptional case where the court can properly direct a verdict in favor of the party having the burden of proof. And this is especially so where a vital fact is sought to be established only by inference from attending circumstances. We think that the intent was not proved so conclusively as to entitle the defendant to a directed verdict upon the affirmative proposition.

Appellant's brief brings before us a number of cases wherein the same form of policy was involved and wherein it was held that recovery could not be had if the injury was intentionally inflicted by a third person. Special reliance is placed upon the case of Butero vs. Travelers' Accident Ins. Co., 96 Wis. 536, 71 N. W. 811, 65 Am. St. Rep. 61. In that case the Supreme Court of Wisconsin considered the evidence and held it to be sufficiently strong in its showing of intentional killing to warrant the granting of a new trial and such new trial was ordered. Although the Wisconsin court did not order a dismissal of the plaintiff's case, it did discuss the evidence, and it appeared to hold that the evidence was conclusive in favor of the defendant. The very discussion of the evidence contained in that opinion impresses us as presenting a question for the jury within the rule that has heretofore been followed in this state. It is to be noted also that in such opinion it is assumed (though without discussion) that, if the killing was the intentional act of an assassin, it was not accidental within the meaning of the policy. Such an assumption leaves the burden of proof upon the plaintiff. A directed verdict in such case for the defendant presents less difficulty than if the burden of the affirmative rested upon it. We are constrained also to say at this point that there is another provision of the insurance certificate which should not pass unnoticed and we set it forth in the next division hereof.

[12, 13] 5. Section 3 of article 9 of the Constitution provides •

as follows: "Sec. 3. Whenever a member of this association in good standing shall, through external and accidental means, receive bodily injuries which shall, independently of all other causes, immediately and wholly disable him from transacting any and every kind of business pertaining to his occupation as shown by the records of this association, he shall be paid for the loss of time occasioned thereby the sum of \$25 per week, not exceeding one hundred and four consecutive weeks. Provided, *that an injury received by a member in an attempt to rob said member—proof of intent to rob to be established by claimant—shall be considered an accident* and the association shall be liable for weekly indemnity only, not exceeding ten consecutive weeks, as in the case of accidental injury received in any other manner." We have italicized the particular provision to which attention is directed. In the case before us it is undisputed that Carmody was shot during an attempt to rob him. The proviso from the "rules" relied on as a defense appears on its face to be inconsistent with the proviso of the constitution here quoted, if it is to be applied to an injury received during an attempted robbery of the assured. It is true that section 3 deals with injuries which result in disabilities only not in death. But the proviso from the "rules" applies on its face to injuries causing "death or disability" inflicted by the member or any other person upon him. To render these two provisions harmonious, we would have to say that the proviso of the "rules" is not intended to apply to an injury inflicted upon the assured during an attempt to rob him. The constitution itself has singled out that specific class of circumstances and has declared that an injury so received "shall be considered an accident." This dispenses with the necessity of proof of intent or want of intent to inflict the injury, provided only that intent to rob is proved.

It is true that this section of the constitution limits the liability of the defendant for resulting *disability* to a weekly indemnity of ten weeks and that it has not assumed to deal with the question of liability in case of death. But the importance of the provision to this case is that it renders the proviso of the rules relied on as a defense non-applicable to a case of robbery. If the two provisos should be deemed conflicting, then a construction should be adopted most favorable to the assured. If Carmody had survived his injuries, it is clear that he would have recovered for his disability and he could have so recovered as for *accidental* injuries upon proof that they were received in an attempt by the burglar to rob him. The attempt to rob is undisputed. In such case the injury "shall be deemed an accident." Carmody did live for about ten weeks after the accident. During that period of time he was deemed under the terms of his policy to have received his injuries by accident. Did his subsequent resulting death change the accidental character of the original injury? It cannot be. The most that could be claimed here would be that,

by the terms of the insurance certificate, his resulting death from this particular accident deprived him of all right of recovery for such accident. In other words, that as to such accident he was insured against *disability* only and not against *death*. This construction would be in direct contradiction to the other provisions of the insurance certificate, notably so to section 2, heretofore quoted. The important thing as to section 3 now under consideration is that it defines the kind of injury involved in this case as an "accident" and specially provides that it "shall be deemed an accident." It purports to insure against the same to some extent at least. This necessarily takes it out of the enumeration of exceptions which we have heretofore quoted. These exceptions make no distinction between death and disability, so far as the nature of the liability is concerned. Neither does any distinction appear as to the nature of such liability in any other part of the insurance certificate unless it be found in section 3 here set forth. This section purports to deal with the *extent* of liability for *disability* only. It does not in terms qualify section 2 to any extent. If the various provisos of this contract are conflicting or inconsistent, then of course they should be construed most favorably to the assured. We think the contract in this case can fairly be construed as insuring against accident received by the victim of an attempted robbery in the course of such attempt; that the intentional infliction of injury by a robber in such a case is reserved from the enumeration of exceptions which are set forth in the rules; that section 3 limits the extent of the recovery for *disability* only; and that it does not qualify section 2 which fixes the amount of recovery in case of death at \$5,000.

To construe the insurance contract otherwise would render it naturally misleading to the assured. Under this construction the plaintiff would have been entitled to a directed verdict under the undisputed evidence and concessions in the case. Plaintiff, however, did not base her claim of recovery on this ground. But, if we should otherwise feel compelled to award new trial because of errors presented, we should deem it our duty to take notice of these provisions of the contract in support of the judgment already obtained. The injury involved is clearly within the fair scope and spirit of accident insurance. The enumeration of exceptions on the back of the certificate is sufficiently voluminous, and we ought not to add to such exceptions by unnecessary construction.

The defendant suffered no prejudicial error in the court below, and the judgment is therefore affirmed.

Weaver, C. J., and Gaynor, Preston, and Withrow, JJ., concur.

DEEMER, J. (dissenting).

So much depends upon the facts disclosed by the record with reference to the manner of Carmody's death that I here reproduce the uncontradicted and undisputed testimony with

reference thereto. Testimony was adduced without objection as to declarations made by deceased just after the shooting. This came from several witnesses, and there is no substantial difference between them as to what was said. This testimony was part of the *res gestæ* and was admissible as substantive testimony. One witness gave the following testimony as to what Carmody said: "Q. Did you have any conversation with him at that time as to how the injury occurred, if so, state what? A. I had hold of his hand; I said, knowing him as I did, I said, 'John, wasn't there anything that you could get hold of that you could beat him up with?' He said, 'No Billy, if there was I could have beat him to death, I know.' Made the remark if he could even got a slipper or anything that he might have battered his head or something of that kind. Q. Did he say where the shooting occurred or anything about that, where they struggled? A. Well, I don't know, of course I know we talked on that line; it was in the house, of course, from one room to the other. Q. Did he say anything about how many times the burglar shot at him? A. I think he made the remark about two or three shots anyhow." On cross-examination plaintiff's counsel insisted on making the following record: "I had been a police officer for 25 years and have had experience in the investigation of burglars. Q. Became acquainted with their ordinary ways and manner of carrying on their business from observation and investigation that you have made? A. I have made some of those investigations, yes. Q. Isn't it a very usual and ordinary thing with those burglars, not robbers, to carry a pistol for the sake of bluffing and intimidation? (Objected to as incompetent, irrelevant, and immaterial and as calling for the conclusion and opinion of the witness. Overruled; defendant excepts.) A. I don't know about their bluffing anything of that kind; I think they are there to do business. Q. Isn't that a common thing for them to be making threats of what they will do without any intention of carrying that out? A. I never came in contact with one of them making those threats." On redirect examination the witness said: "I know it is a matter of common custom that, when a man breaks into a house and is pressed to the wall, the common custom among burglars is to shoot rather than be caught. My impression they are there for business."

The most satisfactory evidence regarding these declarations was from a police officer, named Christensen, who gave the following testimony: "Q. What was the first that you knew of any difficulty happening at the Carmody home on the night that he was shot? A. I heard the shot. I was on Fifth avenue and Sixth street on the south side of Fifth avenue and the east side of Sixth street. I should judge 150 to 175 feet from the Carmody home. The first shot I could not locate. Within four or five seconds there was another shot and I located that one. Officer Graham was with me at the time. We started to run down

there as fast as we could. It could not have been over five minutes after the shot when we arrived there. Q. In the neighborhood of half a minute or so you was there? A. Yes, not very long anyhow. I went to the front door and told officer Graham to go around to the back door. I went up to the front door and it was locked and I couldn't get in. I rapped at the door. Mrs. Carmody was up on this porch hollering, 'Help,' and I stepped back and called to open the door and then went back to the door again, and I think Mrs. Buckingham opened the door. When I got inside in the hall I flashed my light and Mrs. Buckingham and Mr. Carmody was there. It was dark in the front part of the house. There was a curtain drawn between what I call the parlor and the sitting room and the hall. I went right through the house flashing my light and went to the back door. In the dining room there was a light; what I call the dining room; it is the room back of the kitchen. I went to the back door to see if the door was locked and it was bolted on the inside so I knew that he couldn't have gone that way. Mr. Carmody following me back to the back door or right close to me. I came back again and officer was on the outside and he said, 'Sam, I believe here is where he got out.' The window was open on the west side of the house and of course we turned the lights on. Chief Cook was there at the time. He came right in behind me and I turned around and I saw Mr. Carmody was hurt, and I asked him, 'Are you hurt, John?' He said, 'Yes, I believe I am.' I said, 'How bad?' and he said, 'Pretty bad, I have an awful pain.' About that time he was ready to fall and I took him in my arms and I think Chief Cook was there at that time. Cook was the fire chief; he is dead now. I laid him on the couch in what I would call the library. After I got him down on the couch, I opened up the nightdress and I could see the hole right in his stomach; it looked like a bullet hole. Q. Where was Mr. Carmody when you first got in the house? A. In the hall. He and her mother were there; he was pretty excited. Q. What did he say? A. He said, 'The damn, dirty coward, I wish I had of got hold of him,' he says, 'The damn coward, he even slapped my wife.' Q. Did he say where the fellow got him? A. Yes, he said the burglar got him; the fellow that was in the house. Q. Did he tell you anything about where the struggle occurred? A. Yes, he said that his wife awakened him and there was a man in the house and he started after him and got hold of him and he got out on the outside of the door and he got away from him, and he said he still started after him and then is when he shot at him. Q. Did he say whether or not he had held the burglar, that he had hold of the burglar, when the burglar shot him? A. No, he didn't have hold of him at the time. Q. The burglar was away from him when he shot? A. Yes, that is what I understood him to say. Q. He said the shooting occurred outside the bedroom? A. Yes, sir. Q. In the house did you see any evidence

of any struggle having occurred? A. There was some crockery laying broken in the hall at the foot of the stairs. Mrs. Carmody was upstairs when I first got there and was screaming for help. Q. And when you first saw John, what did he say about a man; how did you happen to run through the hall? A. I asked John, 'Is he still in the house?' and he says, 'I believe he is.' That is the reason I went through the house looking for him. There was a light in the dining room; the only light in the house. I flashed my light and that is when I first saw Mrs. Carmody. When we laid Mr. Carmody on the couch I told somebody to tell Mrs. Carmody that John was hurt pretty bad. My first conversation with Mrs. Carmody was after Mr. Carmody was taken to the hospital. Q. You may relate what Mrs. Carmody said to you about how the accident occurred. A. She said the first thing when she woke up she thought she heard some one in the room, and then she seen somebody standing by the bed. He had a little flash light and he threw that in her face, and she began to raise up and he said, 'Lay down at your peril;' and about that time John wakened up and of course they started. It seems as though John was on this side of the bed. Anyhow John got around there and they scuffled and finally got out on the outside of the room and she started for the front window. There was a screen in the window she said and she had to take that out, but I guess it wasn't long, and she raised the window up and got out on the porch. Q. You say that she said John was on the outside of the bed, the west side of the bed? A. Yes, away from the door. Q. He got around on her side? A. He was standing at the foot of the bed as near as she knew. Q. What did she say he said to John? A. He said, 'Lay still or I'll kill you.' Q. What did John say to that? * * * Q. She said he got up when the burglar told him to lay still or he would kill him? A. Yes, and that is when John got out of bed. She heard the shots afterwards, she said. Don't think she said anything about scuffling, not as I could hear anything. I was busy telephoning for the doctor. She said the shots occurred out in the hall after she got outside of the bed and door. I did not see any revolver on the floor around there; no gun of any kind. Q. Did Mrs. Carmody say anything to you about John having a gun or anything of that kind? A. She said he never had a gun in the house."

Other witnesses for the defendant gave substantially the same testimony. Mrs. Carmody, who was a witness for plaintiff in rebuttal, did not dispute any part of the testimony, save that she said: "A. I was asleep and Mr. Carmody was asleep. Something awakened me. I don't know what; my impression is that it was the presence of some one in the room. I raised up and listened and I heard some one on his side of the bed where his clothes were; that is, the west side of the bed. I reached out my hand and put it on him and says, 'Jack! Jack! Some one is in the room.' Just then a flash light was turned on me, on my eyes in-

stantly, and then it was flashed into Mr. Carmody's eyes and then back and forth right close to my eyes and his, and then I raised up and some one struck me a blow here and said, 'Lay quiet at your peril.' Then it seemed as though Mr. Carmody was undertaking to get up and as though he was thrown back on the bed again, because it sounded that way to me. I lay quiet a few minutes, and then the light was turned in my eyes again and then I raised up and he struck me across the face again and broke my gums across the lower teeth and then I lay quiet a little bit, and they had come in a clutch and I could hear the heavy breathing; then everything grew dark on my side and everything was quiet; and then I raised up again and I felt his breath on my face and he leaned down and said, 'Keep quiet or I'll kill you,' and struck me a blow there and it afterwards got as black as my dress. Then I lay down and they were still struggling. I lay there a few minutes, crept down under the bed clothing to the foot of the bed, and got out and ran across the room and tried to get the screen out. I had to unfasten it and throw it out on the roof and I got out on the roof and ran to the north next to Mr. Cook's house and I called for help. When I called for help I was on the north veranda. I called for Mr. Cook and I saw the lights turned on in the room and he came out of the house instantly. Mr. Tourtellot: Let the same objection apply to all this testimony along this line. The Court: All right. (The defendant excepts.) Mr. Cook was the fire chief and lived next door on the west. He was prepared to come out on short notice. I screamed to him to come quick and he turned around and went back in his house, and I turned and ran just as fast as I could to the other end, and that brought me to the window where I had gotten out, and I called there for help and then commenced screaming everything, and then I heard the report of a revolver in the house. Q. Just where were you when you heard the report of the revolver in the house? A. I was directly in front of the window. I was directly in front of the north window. There are three windows in front of the house. The Court: Were you still on top of the porch? A. Yes, sir. Q. Now, from the shot and the noise inside, could you tell just about where Mr. Carmody and the burglar were when this shot occurred? A. I should suppose my husband was right in the door, leading from the room into the hall. Q. Could you tell somewhere about where they were when this shot occurred from the noise or sound? A. Yes. Q. You could make some approximation of about where they were from the sound you heard, about where did this sound appear to come of that shot? A. It was leading into the hall. I ran and got in the window and ran across the floor to this hall and went out and took hold of my husband, who was standing at the head of the landing, the upper landing. The burglar was down by the window. Mr. Carmody was at the top; that would be near the bedroom door. He was standing just about the middle about a

foot from the top of the stairs. I took hold of his nightshirt and held on to it and stayed at his back. The burglar was going downstairs pretty fast. He went swiftly and when he got to the window there on the last step leading to the second landing looking up from the top steps he fired a shot and it whizzed past us. We both stood there and then he went swiftly backwards down about three steps from where that jardiniere stood and then fired up again and that just grazed me here between Mr. Carmody's back and my breast. He was either two or three steps from the bottom. I saw him plainly when he was on this last step that he fired that last shot because the flash of the gun came and I saw he was tall and slim. He then backed down swiftly and he knocked this large jardiniere off with the large plant in, and it made a dreadful crash. * * * Q. Now, was there enough light so that you saw this burglar when you first came out and found your husband in the hall at the top of the stairs, could you see the burglar going down? A. I could see the figure, but when he got down on this last place that he shot then the flash from the gun and with that light that came I could see. The jardiniere stood on a small post about four or five feet high. Q. Now, when this burglar fired the shot that he fired, the first one after you got in the hallway, were you and Mr. Carmody still standing in the hall at the top of the stairs? A. Yes, sir. Q. You saw the burglar going downstairs? A. Yes, sir. Q. Then he turned and shot back upstairs, did he? A. He didn't turn, he went backwards all the way down. This bullet did not hit either Mr. Carmody or myself, it went in the west wall of the hallway. Q. Was anything more seen of this burglar after he fired this last shot near the bottom of the stairs? A. I can't say; I did not see him. The burglar did not say to Mr. Carmody, 'Lie still at your peril or I will kill you.' " On cross-examination the witness said: " * * * I heard a noise on my husband's side of the bed. The noise was the first thing I heard when I awakened my husband. I said, 'Jack, there is some one in the room.' He said nothing. Just instantly a light was thrown in my eyes and the man struck me there and threw his light on us both right down close. Q. Then he flashed the light in your eyes and your husband's eyes and said, 'Move at your peril'? A. He stooped down. When he struck me I cried out, and he stooped down, I could feel his breath, and said, 'Keep still at your peril.' Q. So he was more afraid of you than of Mr. Carmody? A. It seems that way because instantly I awoke my husband, after he turned the light off our eyes, they commenced. He leaned down on my right side and he struck me on my left side. I cannot say what it was; it was a hard substance. Q. The struggle wasn't going on until your husband got out of bed? A. No, but I rather think when my husband undertook to raise up he struck him; the bed seemed to take a terrible jar. I don't know whether when he tried to get up was when he threw him back or not. Q. When your

husband was struck and during the time this man and your husband were struggling in the room, John T. Carmody didn't utter a word? A. No, sir; not in that room. * * * Q. When you heard a gunshot you gave a scream and went back in the room? A. Yes, immediately. Q. When you got out in the hall your husband was standing, you testified, about a foot from the top of the stairs? A. Yes, sir. A burglar then was disappearing down the stairs; I saw his shadow; then he turned and shot on the halfway landing. He went backward all the way down, keeping watch of my husband and myself. Q. When he was about one or two steps from the halfway landing he fired a second shot? A. It might have been three steps; it was near the second landing. Q. Then when he got nearly down he turned and fired the shot that made the dent in the tapestry? A. He didn't turn, because he had his back already the other way. Q. You don't know what occurred between the man on John's side of the bed and John except the sound of the struggle you overheard? A. Yes, the heavy breathing and heard that chair upset when I was coming back on top of the porch. Q. Where was the chair upset? A. On the west side of the bed. Q. When did you see that? A. When they turned the lights on; I turned them on myself. Q. And that was after the shot was fired? A. Yes, I turned the lights on to get my gown, after the burglar escaped from the house."

The only substantial difference between Mrs. Carmody's testimony and that of the other witness seems to be that, upon her examination on the witness stand, she stated that the burglar did not say to Mr. Carmody, "Lie still at your peril, or I will kill you." Although various other witnesses testified that, in giving an account of the transaction immediately after it occurred, she did say that this was what the burglar said to both Mr. and Mrs. Carmody, or Mr. Carmody himself. In the face of this record and without regard to certain procedural matters as the burden of the evidence, the burden of proof, presumptions, etc., which are established simply to arrive at the truth in each and every case, I cannot, much as I would like to do so, agree with an opinion holding that the killing of Carmody was an accident or that any jury uninfluenced by sympathy, passion, or prejudice would be justified in so holding. I do not know how a clearer case of murder could be made out. Carmody said that the burglar "shot at him," that "he got him," etc., and the testimony to my mind clearly establishes that fact. In law every one is presumed to have intended that which the testimony shows he did in fact do. The burglar shot and killed Carmody, and the presumption would be, in the absence of any testimony as to motive, that he did so intentionally. Carmody said that he had shot at him, and the shot was evidently fired after he had gotten away from Carmody and while Car-

mody was pursuing him. To say that it might have been an accident is too much of a stretch on human credulity.

The defendant company is not liable if the shot was fired intentionally by a burglar or any third person. It had the right to so contract, and the courts are not justified in disregarding a perfectly valid provision of the policy. Again, if the first shot was accidental and the burglar had escaped from Carmody knowing, as he must have known from the circumstances, that Carmody was not armed, why did he fire the second and third shots? It was so dark that he could easily escape as the avenues were open and he was upon the stairway going down into the hall. That he did not fire these shots merely to intimidate is clear from Mrs. Carmody's testimony. She said that they passed very close to herself and husband, while they were at the head of the stairs, and she evidently thought they were intended to kill. Their course and direction, as indicated by the witness, leaves no doubt in my mind that they were so fired. One thing is clear from the record, and that is they were not fired accidentally in a scuffle but after the burglar had gotten clear from his assailant. Carmody did not believe they were accidental for he said the burglar shot at him.

The case is so much like one from the Wisconsin court (*Butero vs. Travelers' Insurance Co.*, 96 Wis. 536, 71 N. W. 811, 65 Am. St. Rep. 61) that I cannot forbear quoting therefrom. After quoting the following instruction: "That the burden was on the defendant to satisfy them to a reasonable certainty, and by a preponderance of the evidence, that the insured met his death through intentional violence inflicted upon him by some person or persons unknown. That the presumption of murder does not arise from the mere fact of external marks of violence upon the body of the deceased, as testified to, but 'you must be satisfied from all the evidence, in order to find for the defendant: First, that the insured met his death through bodily injuries inflicted at the hands of some person or persons unknown; second, that at the time such person or persons inflicted such injuries he or they intended to so inflict them upon the body of the said Joseph Butero (that is, that he or they knew, at the time he or they inflicted such injuries, that he or they inflicted them upon the body of the said Joseph Butero); and if you are satisfied from all the evidence that the person or persons inflicting such bodily injuries knew that he or they were inflicting them upon the body of the said Joseph Butero and intended to so inflict them, then you will find for the defendant, otherwise for the plaintiff'" —the court said through Pinney, J.: "The contract upon which the action is founded is that the insurance provided by it 'does not cover accident or death, resulting wholly or partly, directly or indirectly, from * * * intentional injuries, inflicted by the insured or any other person.' In view

of the facts in evidence, and about which there is really no dispute, the question is whether the legal presumption invoked by the plaintiff that the injuries the deceased received were accidental or unintentional is not wholly repelled or overborne by the evidence. The presumption in question properly applies where there is no evidence to show the circumstances and manner in which the injuries were inflicted. The defendant is not liable if the injuries which caused the death of the insured were intentionally inflicted by himself or any other person. While this is a defense, and the burden of proof is ordinarily upon the defendant, yet if it appears upon plaintiff's evidence, or upon the entire case, that such injuries were intentionally inflicted, the legal presumption is overthrown. The defense may be established by facts and circumstances, and the inferences properly to be drawn from them, sufficient to satisfy the jury of the truth of the defense with reasonable certainty. It is beyond question or dispute that the insured came to his death by external and violent means. The legal presumption is that his death was not caused by his own suicidal act. The evidence clearly shows that the external and violent means of his death proceeded from some person unknown. The inquiry is as to the question whether the shooting that caused his death was accidental or intentional and with the design of effecting his death; and this question is to be determined from the facts proved, the manner of his death, and all the attending circumstances. If the killing was accidental as to the insured in that he anticipated or expected no injury but intentional as to his assassin, then, according to the plain language of the provision of the policy, there can be no recovery. *Insurance Co. vs. McConkey*, 127 U. S. 661-667, 8 Sup. Ct. 1360 [32 L. Ed. 308]; *Mallory vs. Insurance Co.*, 47 N. Y. 52 [7 Am. Rep. 410]. The case of *Button vs. Association*, 92 Wis. 83, 65 N. W. 861 [53 Am. St. Rep. 900], was upon a provision materially differing from the one in question, and this case is therefore not in point. It is necessary only that the evidence of intentional killing preponderate against the presumption of accident. *Cronkhite vs. Insurance Co.*, 75 Wis. 119, 43 N. W. 731 [17 Am. St. Rep. 184]; *Johns vs. Association*, 90 Wis. 335, 63 N. W. 276 [41 L. R. A. 587]; *Bachmeyer vs. Association*, 87 Wis. 337, 338, 58 N. W. 399. The plaintiff's counsel relies upon *Hutchcraft vs. Insurance Co.*, 87 Ky. 300, 8 S. W. 570 [12 Am. St. Rep. 484], in which it was held that one assassinated comes to his death by accidental means; but in that case there was not, as there is in this, a provision to the effect that the policy of insurance did 'not cover accident nor death resulting wholly or partly, directly or indirectly, from * * * intentional injury inflicted by the insured or any other person,' and it is not in point. Nor is *Accident Co. vs. Carson* [99 Ky. 441] 36 S. W.

169 [34 L. R. A. 301, 59 Am. St. Rep. 473], which did not contain the same or a similar provision. The same is true of Insurance Co. vs. Bennett, 90 Tenn. 256, 16 S. W. 723 [25 Am. St. Rep. 685]. The killing was clearly the result of intelligent human agency. Was it accidental or intentional? The assured went, at 6 o'clock in the afternoon, from his supper table to his employment as a coal heaver in the coal shed, where he was to spend the night with his companion in hoisting coal. The night was a very dark one. It thundered and lightened and rained, particularly at the time he received the fatal shots. They worked continuously until about 11 o'clock, with their backs towards the railway track, upon which the coal shed opened, with two lighted lamps near them and with the upright hoist between them, operated by cranks, one working on either side. When they had partly raised a bucket of coal, and, so far as it appears, when they were utterly unaware of the presence of any human being, they were startled by a pistol shot, which sent a bullet crashing through the brain of the insured, and he fell dead where he had stood; and two other shots, either of which would have proved fatal, were fired in rapid succession into vital parts of his body. His companion, Dominique, instantly fled and ran about a block to the station. He had seen no one about there during the evening and had heard no one, and there is nothing to show that the assured had or that he uttered any word or exclamation. He was presently found dead where he fell, and the evidence tends to show that one of the shots was fired with the weapon so near his body as to disolor his clothing with the burning powder. The shots could have proceeded only from the open side of the shed next to the railway track, and it was lighted with two lamps as stated. The hour and the night was one in which honest men are not likely to be abroad with firearms. The time, place, and circumstances were suited to criminal purposes. It seems impossible for persons of reasonable intelligence to be deceived, in the presence of these pregnant facts, pointing unmistakably to only one conclusion. If it were possible to conclude that the first shot was fired accidentally, what are we to think in respect to that question, when it was instantly followed by two other shots, evidently aimed at vital portions of the body of the insured, and which took effect, inflicting fatal wounds? How many shots are we to believe were accidentally thus fired in rapid succession upon and into vital parts of the body of the insured, and under circumstances so favorable for assassination, at a time when firearms would be mainly in requisition or use for criminal purposes? It is contended, however, that there is no evidence that the assassin, at the time he inflicted the wounds, intended to inflict them on the body of the insured (that is to say, that there is no evidence to show that he knew, at the time he inflicted

them that he was inflicting them upon the body of Butero, the insured) ; and that, in the absence of such proof, the killing must be regarded as accidental and covered by the provision of the policy. The case of Utter vs. Insurance Co., 65 Mich. 545, 32 N. W. 812 [8 Am. St. Rep. 913], is confidently relied on. In that case the provision of the policy was that the insurance 'should not be held to extend * * * to any case of death or personal injury, unless the claimant under this policy shall establish, by direct and positive proof, that said death or personal injury was caused by external violence and accidental means and was not the result of design, either on the part of the insured or of any other person.' In that case the testimony was conflicting as to the circumstances of the killing; that of the plaintiff tending to show that the officer knew the insured and demanded his surrender as a deserter and shot him in self-defense, while that of the defendant tended to show that the shooting was reckless, and that the officer did not know the deceased, nor that he had shot him, until after the killing. It was held that the case should have been submitted to the jury, and that the design mentioned in the policy must be considered as a design to kill the insured; and if such design did not exist when he fired the shot, or if he did not know that the man he was shooting at was the insured, then the plaintiff might recover on the policy. The present case is clearly distinguishable. Here there is evidence sufficient to show that the assassin intended to shoot Butero, the insured, and that when shooting he knew that he was shooting him and intended to kill him. It is true that no witness has testified to this effect in so many words, but this is the just and proper result of the facts and circumstances given in evidence and in respect to which there is no conflict or dispute. It cannot be expected that the assassin would expressly declare his recognition of his victim either immediately before or at the time of firing repeated fatal shots in and upon his body. All this is ordinarily to be left to inference, from a variety of facts and circumstances proved before the jury. Here the assassin went to the place, at the late hour of 11 o'clock at night, when a violent storm was prevailing, where Butero worked with his companion, approaching him from behind, when there were two lights burning near him. He did not direct his fire against Dominique, but at once selected his victim and sent a bullet through his head, from which he fell dead, and he followed it by two other shots, evidently aimed with murderous intent, inflicting wounds either of which would have been fatal, and at a time when the evidence tends to show that he stood near enough to his victim to quite touch him with his extended hand. Had the first shot been fired through accident and not intentionally, it is not reasonable to suppose it would have been followed at once by others. Is it not a just

and reasonable conclusion that the assassin recognized, and had no doubt of the identity of, his victim and followed the first shot by two others to certainly execute his deadly purpose? There is no evidence, fact, or circumstance tending to show, or even suggest, that the death of Butero, the insured, was accidental, within the meaning of the policy. The facts admit, we think, of but one conclusion. '*Res ipsa loquitur.*' We think that the evidence was sufficient to show with reasonable certainty that Butero was murdered, and that his murderer knew his victim when he fired the fatal shot, and that he fired it with intent to kill him. The court erred, in our judgment, in refusing to set aside the verdict and grant a new trial."

So here I think the facts admit of but one conclusion. See, also, *Orr vs. Travelers' Co.*, 120 Ala. 647, 24 South. 997; *Mattson vs. Travelers' Co.*, 93 Me., 469, 45 Atl. 518, 74 Am. St. Rep. 368; *Travelers' Ins. Co. vs. Wyness*, 107 Ga. 584, 34 S. E. 113; *American Co. vs. Carson (Ky.)* 30 S. W. 879. In this connection the court gave the following instruction: "In answer to your written request for advice touching the last two shots fired, you are instructed that you may consider with what intent the burglar fired the second and third shots as bearing on the question of his intent in firing the first shot; but, if you find from the evidence that the first shot was fired accidentally, then it makes no difference with what intent the second and third shots were fired; and if you are unable to determine, from a preponderance of all the evidence introduced bearing upon that question, whether the first shot was fired accidentally or intentionally, then you should find that it was fired by accident." This, it seems to me, is entirely erroneous and prejudicial, and the effect of it was to take away from the jury all consideration of the firing of the second and third shots in so far as they bore upon the intent of the burglar. Assuming that the jury started out with the presumption that the shots were accidental, they, under this instruction, would have been justified, indeed, it would seem to have been their duty, to disregard the second and third shots. The instruction, to my mind, presents an anachronism if not a solecism.

The court also instructed: "(7) The burglar in this case may have intended to commit larceny and may even have intended to fire his pistol at the time the shot took effect without intending to injure the deceased, and, unless it appears affirmatively by a fair preponderance of the evidence that the burglar intentionally and did thereby intend at the time to inflict an injury upon the said Carmody, then the defendant has failed to sustain this ground of defense. Or if you find that the pistol went off accidentally, or as the result of a struggle between the burglar and Mr. Carmody without regard to which one was holding it, the defense that the injury was intentionally

inflicted is not made out. But if you find the burglar intended to hit and injure Mr. Carmody when he fired, or if you find from all the evidence that the discharge of the pistol was not the result of a struggle, then this defense has been made out and you should so find by your verdict." This instruction, to my mind, had no support in the testimony. It was not fired as the result of a struggle, in which Carmody may have himself discharged it, nor was there any testimony tending to show that fact. The instruction invited the jury into a field of surmise, conjecture, and speculation for which there was no warrant in the testimony.

Moreover, I especially dissent from the argument made in the fifth division of the opinion. Counsel for appellee makes no such point; and, to my mind, the fact that the company inserted this third section in article 9 of its constitution clearly negatives the thought that it in any way intended to modify the other provision as to accidents resulting in death. In one case it assumed liability for certain accidents, resulting in injury only, and specifically and expressly contracted against liability for death resulting in any such manner.

II. With the general rule as to burden of proof of an exception contained in a policy of insurance, as announced by the majority, I have no quarrel, but it should be noted that in the cases first cited, or the majority of them, as in *Jones vs. Accident Co.*, 92 Iowa, 652, 61 N. W. 485, there was no such clause in the policy as the defendant is here relying on.

I shall not enter into a long discussion of the troublesome questions of *prima facie* cases, presumptions, burden of the evidence, and burden of the proof. These terms have perplexed courts and text-writers from time immemorial, and it may be said that there are all kinds of presumptions and that the burden of the evidence is something entirely different from the burden of proof. These matters are fully discussed in Chamberlain on Evidence, vol. 2, §§ 930 to 1231, inclusive, and of course it is impractical to set out even a small part of that discussion. The matter is also considered by Wigmore, in his Treatise on Evidence, vol. 4, §§ 2490-2494. Giving, to the presumption of accident, all the force to which it is entitled, it is not such as to create a conflict in the testimony if the known facts, as disclosed by the testimony, overcomes the presumption. Such presumption applies when and only when there is no evidence showing the circumstances and manner in which the injuries were inflicted. In other words, the legal inference of presumption must yield to well-established facts, and, when the facts are thus shown, the presumption no longer stands as affirmative evidence. I shall cite but a few authorities in support of this view in addition to the Wisconsin case already referred to. In several cases heretofore before this court, where the presumption of accident

arose, we held, upon facts no stronger than are here presented, that this presumption did not stand as affirmative proof, making each case one for a jury, no matter what the testimony for the defense. Indeed, in each of these we held in effect that the presumption alone was not enough to carry the case to a jury, where the defense introduced affirmative testimony which met the presumption. I refer to the following: Inghram vs. National Union, 103 Iowa, 395, 72 N. W. 559; Beverly vs. Supreme Tent, 115 Iowa, 524, 88 N. W. 1054; Gavin vs. Des Moines Co., 149 Iowa, 152, 126 N. W. 906; Carnes vs. Association, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. Rep. 306; Connell vs. Traveling Men's Ass'n, 139 Iowa, 444, 116 N. W. 820. If, as said in the latter case, the facts and circumstances proved (by defendant) must be such as to exclude any other reasonable hypothesis than that it resulted from suicide (homicide), I think those facts and circumstances are here present and that no other reasonable hypothesis than murder arises from this record. A presumption may stand as affirmative proof in some cases, and a *prima facie* case always calls for testimony from the other side, but the presumption of accident in insurance cases should not be allowed to overcome such a clear case as is made for the defendant in the record before us. See, as supporting these views, Agen vs. Life Co., 105 Wis. 217, 80 N. W. 1020, 76 Am. St. Rep. 905; W. O. W. vs. Hruby, 73 Neb. 5, 96 N. W. 998; Wigmore on Evidence, § 2493; Peters vs. Lohr, 24 S. D. 605, 124 N. W. 853; Elliott on Evidence, §§ 91, 92, 93; Burk vs. Walsh, 118 Iowa, 397, 92 N. W. 65.

Prof. Thayer, in his work entitled *Preliminary Treatise on Evidence*, 575 and 576, discusses this question very thoroughly, and there is also a learned discussion of the matter in 3 *Harv. Law Review*, pp. 148, 151, 156, 166. We have adopted Judge Thayer's rule in State vs. Thiele, 119 Iowa, 659, 94 N. W. 256. See, also, Clemens vs. Royal Neighbor, 14 N. D. 116, 103 N. W. 402, 8 Ann. Cas. 1111; Stevens vs. Continental Co., 12 N. D. 463, 97 N. W. 862; Kornfeld vs. Supreme Lodge, 72 Mo. App. 604; Mutual Life Co. vs. Hayward (Tex. Civ. App.) 27 S. W. 36; Supreme Lodge vs. Fletcher, 78 Miss. 377, 28 South. 872, 29 South. 523; Hardinger vs. Brotherhood, 72 Neb. 860, 103 N. W. 74 (reversing 101 N. W. 983).

But I promised myself not to go deeply into this perplexing problem; and to meet this promise I shall not take the time to cite further cases. The trial court erred, in my opinion, in giving the instructions to which I have referred and in not setting aside the verdict of the jury. As said in the beginning, I regret this conclusion, but I cannot, in justice to my convictions, join in an opinion affirming the judgment.

Ladd, J., joins in the above dissent.

APPELLATE COURT OF INDIANA.

DIVISION No 1.

INDIANA LIFE ENDOWMENT CO.

vs.

REED. (No. 8,037.)*

1. INSURANCE—ACTION ON POLICY—EXHIBITS—DISMISSING PART OF COMPLAINT—EFFECT ON EXHIBIT.

The dismissal of the first paragraph of the complaint, with which the insurance policy sued on was filed as an exhibit, did not take the exhibit out of the case so as to prevent its making a part of the second paragraph of the complaint, which alleged that the policy, a copy of which was filed with the first paragraph of the complaint, was referred to and made a part of the second paragraph; there being no order permitting the withdrawal of the exhibit.

(For other cases, see Insurance, Cent. Dig. §§ 1588, 1589; Dec. Dig. § 631.)

2. CONTRACTS—EFFECT OF RENUNCIATION.

The renunciation of an executory contract before or after time of performance entitles the other party to immediately sue for damages caused by such renunciation and recover in a single suit all of the damages to which he is entitled.

(For other cases, see Contracts, Cent. Dig. §§ 1511, 1585-1588; Dec. Dig. § 329.)

3. INSURANCE—LIFE INSURANCE—BREACH OF CONTRACT—DENIAL OF LIABILITY.

In answer to the insured's demand, upon losing a hand, upon the company for payment under an accident insurance policy, conditioned on total and permanent disability, the company wrote that "we do not think that our policy covers an accident of that character," and that, while insured could not thereafter follow his usual business, the loss of his arm did not totally and permanently disable him from doing all kinds of manual labor, as a one-armed person might often make as much money as when he had two arms and that the company "cannot make payment; in fact we have no right to do so, unless the insured is totally and permanently disabled for life from doing anything whereby he may earn a livelihood," and concluded: "We shall be pleased to hear from you at any time, and in case that developments might unfold which would really prevent your ever being able to earn money again, all we want is proof thereof." *Held*, that the letter was not a total repudiation of the contract or a denial of all liability by the company but only a denial of liability under the policy for loss of an arm.

(For other cases, see Insurance, Cent. Dig. § 1518; Dec. Dig. § 611.)

4. CONTRACTS—BREACH BY RENUNCIATION.

To constitute a breach of contract by renunciation, the denial of liability must distinctly cover all of the obligations of the defaulting party under the contract.

(For other cases, see Contracts, Cent. Dig. § 1279; Dec. Dig. § 313.)

* Decision rendered, Nov. 6, 1913. 103 N. E. Rep. 77.

5. PLEADING—RELIEF—CONFLICTING THEORIES.

A pleading must be drawn upon some definite theory, determined by its general scope, and, if it is insufficient on the theory on which it is drawn, it cannot be held good on an inconsistent theory, though its allegations tend to show a cause of action on such theory.

(For other cases, see *Pleading*, Cent. Dig. §§ 107-111; Dec. Dig. § 49.)

6. INSURANCE—ACCIDENT INSURANCE—RELIEF—THEORIES OF COMPLAINT.

Where a complaint, in an action on an accident insurance policy, was based on the theory of an action for damages for a repudiation of the contract, it cannot be held good as an action for the stipulated amount due monthly from total and permanent disability, even if it sufficiently alleges such an action; the two theories being inconsistent.

(For other cases, see *Insurance*, Cent. Dig. §§ 1575-1580, 1584-1586, 1592, 1598; Dec. Dig. § 629.)

7. INSURANCE—ACCIDENT INSURANCE—ACTIONS—ALLEGATIONS OF COMPLAINT—DENIAL OF LIABILITY.

Allegations of the complaint, in an action on a life and accident insurance policy, that defendant wholly refused and declined to make any payment whatever on the policy and wholly renounced and repudiated their contract sufficiently showed a renunciation of the insurance contract.

(For other cases, see *Insurance*, Cent. Dig. §§ 1575-1580, 1584-1586, 1592, 1598; Dec. Dig. § 629.)

8. INSURANCE—ACCIDENT INSURANCE—ALLEGATIONS OF COMPLAINT—DAMAGE.

Allegations of the complaint, in an action on an accident insurance policy, that the company wholly renounced and repudiated their said contract and policy, and that by reason of defendant's renunciation and repudiation plaintiff was damaged in the sum named, sufficiently alleged damage by reason of the repudiation of the contract.

(For other cases, see *Insurance*, Cent. Dig. §§ 1575-1580, 1584-1586, 1592, 1598; Dec. Dig. § 629.)

9. INSURANCE—CONTRACT—CONSTRUCTION.

An ambiguous insurance contract will be strictly construed against the company and so as to sustain rather than defeat its purpose, if that can fairly be done.

(For other cases, see *Insurance*, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

10. INSURANCE—CONSTRUCTION OF CONTRACT.

An insurance contract should be reasonably construed so as to effectuate its purpose, considering the situation of the parties and their mutual intention at the time.

(For other cases, see *Insurance*, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

11. INSURANCE—ACCIDENT INSURANCE—CONSTRUCTION OF POLICY.

An insurance policy executed while insured was, to the company's knowledge, working as an illiterate laborer provided that, if insured should become totally and permanently disabled from performing any and all kinds of manual labor or business upon which he may depend for a livelihood, he should receive certain monthly benefits, and that

the term "total and permanent disability" should mean such disability as shall render insured totally incapable of doing or directing any service by which he might earn a livelihood, and that such disability is of such character as to make recovery improbable. *Held*, that insured could recover the stipulated payments upon becoming totally and permanently disabled from following any occupation, whether his usual occupation or not, from which he might by reasonable effort obtain a livelihood, even though he might possibly by education or other means not then available, at some future time become able to earn a living.

(For other cases, see Insurance, Cent. Dig. § 1310; Dec. Dig. § 524.)

12. INSURANCE—ACCIDENT INSURANCE—ACTIONS—QUESTION OF FACT.

Whether insured was totally and permanently disabled by the loss of an arm so as to prevent him from earning a livelihood by any kind of service, as required by the policy to authorize a recovery, was a question of fact for the court or jury to be determined upon all of the evidence on the question of disability.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

13. INSURANCE—ACCIDENT INSURANCE—AMOUNT OF RECOVERY.

A life and accident insurance policy provided that, in case of disability of insured entitling him to the stipulated payment in such case, the company's liability to the beneficiary at insured's death should cease unless the payment of dues was continued during such disability, in which event the beneficiary's rights should be preserved, entitling her to payment at insured's death upon deducting from the total sum stipulated in the policy the amount paid during insured's disability, but the contract did not provide for a change of beneficiaries. *Held*, that the beneficiary's interest was not divested by the company's refusal to pay a claim for disability benefits, or by renunciation of the contract, or by a suit to which she was not a party, and hence, in an action by the insured alone for damages for the repudiation of the contract by the company upon refusing to pay disability benefits, plaintiff's recovery could not be for the full face value of the policy.

(For other cases, see Insurance, Cent. Dig. § 1791; Dec. Dig. § 666.)

14. APPEAL AND ERROR—BRIEFS—FAILURE TO DISCUSS ERRORS.

Assignments of error not discussed by appellant are waived.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.)

Appeal from Circuit Court, Gibson County; Herdis F. Clements, Judge.

Action by Levi L. Reed against the Indiana Life Endowment Company. From a judgment for plaintiff, defendant appeals. Reversed, with directions to sustain motion for new trial and for further proceedings.

William D. Hardy and Robinson & Stilwell, all of Evansville, for Appellant.

Ely & Ely, of Petersburg, John M. Vandeveer, of Oakland City, and Simon L. Vandeveer, of Princeton, for Appellee.

FELT, J.

This is a suit to recover on an insurance policy and also to recover damages for the repudiation of the insurance contract. The complaint was in three paragraphs, but the first paragraph was dismissed. Trial by the court with a finding and judgment for plaintiff for \$5,000, the face of the policy, and interest from November 27, 1908.

The errors assigned are: The overruling of appellant's demurrer to the second and also to the third paragraph of the complaint; the sustaining of appellee's demurrer to the second paragraph of answer to the second paragraph of complaint; also the same ruling on a similar answer to the third paragraph of complaint and the overruling of appellant's motion for a new trial.

The third paragraph of complaint, omitting formal parts, is as follows: "That on the 22d day of June, 1908, the said defendant, in consideration of the sum of \$5, to be paid to the defendant herein on or before the 1st day of each calendar month thereafter as a premium, executed and delivered to the plaintiff herein a policy of life, disability, and accident insurance No. 1548. That said policy provided among other things that: 'If the said Levi L. Reed, the insured herein, shall become totally and permanently disabled from performing any and all kinds of manual labor or business upon which he may depend for a livelihood, upon receipt of satisfactory proof of such total and permanent disability this company will pay the monthly benefits hereinafter stipulated to the said Levi L. Reed, so long as he shall live, not, however, to exceed the maximum amount stated in this policy.' That the monthly benefits stipulated in said policy was and is the sum of \$70 a month. That the maximum amount stipulated and named in said policy is the sum of \$5,000. That thereafter, to wit, on the 19th day of November, 1908, the plaintiff herein was accidentally shot in the left hand by the accidental discharge of a shotgun then and there held by him, so tearing, mangling, and wounding his said left hand that the same was necessarily amputated at the wrist. That at the time of the execution of said policy the plaintiff was forty-eight years of age. That his occupation is now, and at that time was and always has been, that of a manual laborer on a farm and a manual laborer in mining coal, and that he had never followed, nor was he qualified to follow, any other occupation for a living at the time of the execution of said policy nor for many years before, and that he depended upon said occupations and upon them alone for a livelihood for himself and his family. * * * That at the time of said injury and the execution of said policy, and for many years before and ever since, the plaintiff has had no property whatever and has had to make his living by manual labor on a farm in spring and summer, and manual labor in mining coal in the fall and winter, and that he depended upon

said manual labor for the support of himself and family as aforesaid. That the plaintiff is an illiterate man, never having graduated even in the common schools of his day. That ever since the infliction of said injury the plaintiff has been in extremely bad health, to wit, nervous and weak and is constantly growing more nervous and weak, all of which has been caused by said injury. That as a result of said injury the plaintiff has been and is totally and permanently disabled from performing any and all kinds of manual labor upon which he depended for a living for himself and family as aforesaid. That he is wholly incapacitated and disabled for the business of farming and mining coal or either of them for all time to come by reason of the injury aforesaid. That on or about the 24th day of November, 1908, the plaintiff notified the defendant in writing of said accident to himself and requested the defendant to pay him his monthly benefits stipulated and provided for in said policy of insurance. That said written notice was received by the defendant, and after receiving the same, to wit, on or about the 27th of November, 1908, the said defendant wholly refused and declined to make any payment whatever on said policy to said plaintiff and wholly renounced and repudiated their said contract and policy and have never paid anything whatever thereon. That, by reason of the defendant's said renunciation and repudiation of its said contract and policy, the plaintiff was and is damaged in the sum of \$5,000. That plaintiff is forty-eight years of age and has a life expectancy of twenty to twenty-seven years. Plaintiff further avers that before the beginning of this suit he fully performed all of the conditions of said contract and policy upon his part to be performed."

The second paragraph of complaint contains substantially the same averments as the third and, in addition thereto, seeks to make the policy a part of the pleading by the following averment: "A copy of which is filed with the first paragraph of this complaint marked 'Exhibit A' and is referred to and made a part of this paragraph of complaint." It is also averred: "That on the 27th day of November, 1908, the defendant herein in writing answered the written notice and demand of plaintiff as follows: 'Evansville, Ind., Nov. 27, 1908. Mr. Levi L. Reed—Dear Sir: Your letter of the 25th inst. received and noted. We are indeed sorry to hear of the accident which deprived you of your left arm, but we do not think that our policy covers an accident of that character. Of course it is true that you are not in condition to hereafter follow the same kind of business which you have heretofore done, but the loss of the left arm does not totally and permanently disable a man from performing or directing any and all kinds of manual labor or business upon which he may depend for a livelihood. A man with a good right arm frequently holds a good position and makes as much

money as he did when he had both arms. We are always prompt in meeting our contracts if they come within its scope, but we cannot make payment—in fact we have no right to do so—unless the insured is totally and permanently disabled for life from doing anything whereby he may earn a livelihood. We shall be pleased to hear from you at any time, and in case that developments might unfold which would really prevent your ever being able to earn money again, all we want is the proof thereof. We are, as we said before, exceedingly sorry when our policy-holders meet with troubles, and for your sake we wish that the policy covered accidents of that character, but we do not believe that it does in any way cover this. With kindest regards we remain, The Indiana Life Endowment Company, per C. A. Hostetter, Secy.—thereby renouncing and repudiating said contract and policy of insurance so executed and delivered by the defendant to plaintiff, and thereby renouncing, repudiating, and disclaiming any and all liability by reason of said accident to plaintiff as hereinbefore mentioned, whereby plaintiff says the maximum amount of said policy, to wit, \$5,000, became and is now due and payable."

It is contended that the second paragraph seeks to recover on the policy and is insufficient because the policy is not by exhibit or otherwise made a part of the pleading; it being claimed that the dismissal of the first paragraph took the exhibit out of the case for all purposes.

It has been held in numerous decisions that, where several paragraphs of a complaint, or several paragraphs of answer, refer to the same written instrument as the foundation of such pleadings, one copy of the instrument, duly made a part of one paragraph, is sufficient, and it may be incorporated into other pleadings by proper reference. It is claimed, however, that these decisions do not answer the objection where the paragraph of which the instrument is a part has been dismissed.

In Sidener vs. Davis, 69 Ind. 336, the court decided that a reference in a counterclaim by the words "a copy of which is filed with the complaint" was sufficient to make the instrument referred to a part of the counterclaim and, in discussing the question (69 Ind. 341), said: "If it should be said that in case the plaintiff dismissed his complaint, and the defendant still desired to prosecute his counterclaim, then the counterclaim would be without its proper exhibit, to this it might be answered that the plaintiff, if he should dismiss his complaint, cannot withdraw the papers from the files without leave of the court, and the exhibit would still remain for the benefit of the counterclaim. It does not appear to us that any inconvenience could occur in practice on this account, as the whole matter would at all times be under the proper care and supervision of the court."

In Anderson vs. Wilson, 100 Ind. 492-407, the Supreme Court

declares that, notwithstanding an original pleading has been dismissed, the papers remain on file and may be referred to in support of other or subsequent pleadings.

[1] While the exact question here presented was not before the court in the cases last cited, we think the reasoning is sound and hold that the dismissal of the first paragraph of the complaint, in the absence of an order of the court permitting the withdrawal of the papers, did not take the exhibit out of the case for the purpose of making it a part of the second paragraph of the complaint, as an exhibit, by reference thereto. The numerous cases referred to as holding that an amended pleading takes the original pleading and all rulings thereon out of the record are not in conflict with our conclusion as above announced.

While the policy is made a part of the second paragraph of complaint, when all the averments are considered, including the demand for \$5,000, it is apparent that the theory of the paragraph is that appellant repudiated the contract by denying all liability to appellee. In discussing this paragraph appellee says: "The theory of the plaintiff is that, upon repudiation by defendant, plaintiff is entitled to sue immediately for damages caused by the repudiation."

[2] With few exceptions the courts of England and America have held that the enunciation of an executory contract, either before or after the time of performance has arrived, or the refusal to carry out the provisions of a contract in course of performance, gives a right of action to the injured party for the damages sustained by reason of such breach or repudiation of the contract. A denial of all liability, where liability has attached, is held to give the injured party the right to treat the contract as broken or repudiated and to pursue his remedy for damages for the breach and to recover, once for all, in a single suit all that may ultimately be due him. *Hochster vs. De La Tour*, 75 English Com. Law (2 E. & B.) 678; *Johnstone vs. Milling*, 16 Law Report (Q. B. D.) 460-466; *Roehm vs. Horst*, 178 U. S. 1-19, 20 Sup. Ct. 780, 44 L. Ed. 953; *Anvil Mining Co. vs. Humble*, 153 U. S. 540-552, 14 Sup. Ct. 876, 38 L. Ed. 814; *Pierce vs. Tennessee Coal, etc., Co.*, 173 U. S. 1-6, 19 Sup. Ct. 335, 43 L. Ed. 591; *Hamilton vs. Love*, 152 Ind. 641-645, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384; *Adams vs. Byerly*, 123 Ind. 368, 24 N. E. 130; *Inland Steel Co. vs. Harris*, 49 Ind. App. 157-163, 95 N. E. 271; *Phillips vs. U. S. Ben. Soc'y*, 120 Mich. 142, 79 N. E. 1; *Hartford Fire Ins. Co. vs. Smith*, 3 Colo. 422-426; volume 1, *Beach on Modern Law of Contracts*, p. 492, § 409 et seq.; 1 *Bishop on Contracts* (2d Ed.) § 1428; 9 Cyc. p. 635.

The doctrine of the right to sue for damages for the renunciation of an executory contract has been invoked against an

insurance company for alleged refusal to carry out a contract of insurance with a policyholder.

In the case of O'Neill vs. Supreme Council, American Legion of Honor, 70 N. J. Law, 410, 416, 57 Atl. 463, 466, 1 Ann. Cas. 432-434, the Supreme Court of New Jersey, after an exhaustive review of the decisions, said: "Upon the whole we are satisfied that the doctrine of Hochster vs. De La Tour is well founded in principle as well as supported by authority. We are also clear that it applies to such a contract as the one in suit, and that the declaration sets forth a renunciation so clear and unequivocal as to give ground for an action; it being averred that the defendant has declared to the plaintiff that it will not perform the contract and has refused to accept the monthly assessments tendered by the plaintiff in performance of conditions precedent on his part."

[3] The second paragraph of complaint sets out the letter received from appellant in reply to appellee's request for payment and follows it by the words: "Thereby renouncing and repudiating said contract and policy of insurance * * * and thereby renouncing, repudiating, and disclaiming any and all liability by reason of said accident to plaintiff * * * whereby plaintiff says the maximum amount of said policy * * * is now due and payable." Whether this paragraph avers facts sufficient to show a denial of all liability on the insurance contract depends wholly on the meaning of the letter set out in the pleading, for the only averments on the subject of a denial of liability or renunciation of the contract refer to and are made dependent upon the letter received from appellant.

[4] To constitute a breach of contract by renunciation or denial of liability, such renunciation must be distinct and unequivocal and cover all obligations or performances thereunder to which the contract binds the defaulting party. 3 Page on Contracts, § 1439; 1 Beach on Modern Law Contracts, § 413; 9 Cyc. p. 636 (11); Benjamin on Sales, p. 746, § 8660; Johnstone vs. Milling, *supra*.

In Daley vs. People's B. L. & S. Ass'n, 178 Mass. 13, 18, 59 N. E. 452, 453, the Supreme Court of Massachusetts said: "A mere refusal to pay money when due, especially a refusal based upon the terms of the contract and in good faith although mistakenly believed to be justified by it, is not a repudiation of the contract and does not warrant a rescission. The only remedy is a suit upon the contract."

The language of the letter when fairly construed does not amount to a denial of all liability on the part of appellant or to a repudiation of the contract of insurance. The letter in substance denies that the policy makes the company liable for an accident resulting in the loss of a hand and states that the policy does not create a liability, and the company has no right to pay,

except in cases of total and permanent disability. It also clearly indicates that, if further developments bring appellee within the terms of the policy, all that the company will require before payment, is proof of such facts. From this it follows that the second paragraph of complaint is insufficient on the theory of a breach or renunciation of the insurance contract. Can the paragraph be held good on any other theory?

[5] A pleading must proceed upon some definite theory, which must be determined by its general scope and character. This rule is not in conflict with decisions holding complaints good which contain averments not essential to a recovery or which aver numerous facts not inconsistent with the general theory of the pleading, proof of a part of which may authorize a recovery. But, where a pleading is drawn on some definite theory and is insufficient on that theory, it cannot be held good on some other and entirely inconsistent theory, though it may contain some averments tending to show a cause of action on such other theory. *Dyer vs. Woods*, 166 Ind. 44-51, 76 N. E. 624; *State ex rel. vs. Scott*, 171 Ind. 349-353, 86 N. E. 409; *Lake Shore, etc., Co. vs. Myers*, 98 N. E. 6564.

[6] The second paragraph is not drawn on the theory of a recovery according to the provisions of the policy but on the theory of damages for the renunciation of the contract of insurance and a denial of all liability. While there are some averments tending to show a liability for the monthly benefit due in case of total disability, such a recovery depends on the contract and can only be obtained by an enforcement of its obligations, while the paragraph, as already shown, proceeds on the theory of damages for a breach of the contract and treats the policy as annulled or ended for all purposes except such as it may serve in the suit for damages.

In *Johnstone vs. Milling*, supra, Lord Esher said (16 Law Reports [Q. B. D.], 467): "The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue."

Since we have held the second paragraph insufficient on the theory of a suit for damages, it cannot be held good as showing a liability for the stipulated amount due monthly for total and

permanent disability, for granting, but not deciding, that the averments are otherwise sufficient to authorize such recovery, the theory would be utterly inconsistent with that of a suit for damages for the breach of the contract. A suit to recover for total disability counts upon the contract, and the suit for damages treats it as broken and ended except for the one purpose of sustaining the claim for damages for its breach.

The third paragraph of the complaint is likewise for damages for the renunciation or breach of the insurance contract. The policy is not made a part of this paragraph, but the averments show its issuance to appellee, performance on his part, his injury, notice to appellant, and then avers that "said defendant wholly refused and declined to make any payment whatever on said policy to said plaintiff and wholly renounced and repudiated their said contract and policy and have never paid anything whatever thereon."

[7] The letter from appellant is not set out in this paragraph, nor are the averments of the refusal of payment and renunciation of the contract made dependent upon it, so that as a matter of pleading the averments are sufficient to show a refusal to pay anything on the policy and a renunciation of the insurance contract.

[8] The averment that appellant "wholly renounced and repudiated their said contract and policy," considered with the other averments, is sufficient, as a matter of pleading, to show a damage to appellee in some amount by reason of such renunciation and repudiation of the insurance contract. O'Neill vs. Supreme Council, etc., *supra*; Kurtz vs. Frank, 76 Ind. 594 et seq., 40 Am. Rep. 275; 9 Cyc. 9, 635.

In Roehm vs. Horst, *supra*, the Supreme Court of the United States, by Chief Justice Fuller, after reviewing the decision on the subject of an anticipatory breach of an executory contract and cases dealing with renunciation or breach after the time fixed for the performance of a contract, said (178 U. S. 19, 20 Sup. Ct. 787, 44 L. Ed. 953): "We think that there can be no controlling distinction on this point between the two classes of cases, and that it is proper to consider the reasonableness of the conclusion that the absolute renunciation of particular contracts constitutes such a breach as to justify immediate action and recovery therefor. The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as any performance is concerned, and that the other party must accept this position, why should there not be a speedy action and settlement in regard to the rights of the parties? Why should a locus penitentiae be awarded to the party

whose wrongful action has placed the other at such disadvantage? What reasonable distinction *per se* is there between liability acts to be done under a contract in course of performance and liability for a refusal to perform the whole contract made before the time for commencement of performance?"

The third paragraph, therefore, states a cause of action for damages in some amount for the breach or renunciation of the insurance contract.

A new trial was asked on the ground (1) that the decision of the court is not sustained by sufficient evidence; (2) that the decision is contrary to law; (3) that the assessment of the amount of recovery is erroneous, being too large; (4) error in the admission of certain evidence. The policy, the notice to the company of appellee's claim, and appellant's written reply were put in evidence.

The policy is in part as follows: "In consideration of the application of Levi L. Reed, of Winslow, in the state of Indiana, for this policy, which application is hereby made a part of this contract, * * * and the payment of five dollars per month on or before the first day of such calendar month hereafter, in advance, and also in consideration of a full compliance with all the terms, conditions and provisions indorsed upon the back of this policy, each of which said terms, conditions and provisions is hereby made a part of this policy: The Indiana Life Endowment Company will pay to the beneficiary herein named, immediately upon receipt of the satisfactory proof of the death of the said Levi L. Reed, herein called the insured, one hundred dollars for funeral and other emergency expenses and thereafter will pay to Martha F. Reed (wife), herein called the beneficiary, the sum of seventy dollars monthly, on the first day of each calendar month during her natural life, or until marriage or remarried, not to exceed, however, the total sum of five thousand dollars. Or if the said Levi L. Reed, the insured herein, shall become totally and permanently disabled from performing any and all kinds of manual labor, or business upon which he may depend for a livelihood, upon the receipt of satisfactory proof of such total and permanent disability, this company will pay the monthly benefits herein stipulated to the said Levi L. Reed so long as he shall live, not however to exceed the maximum amount stated in this policy."

Among the provisions referred to on the face of the policy and printed on the back thereof are the following:—

"Sixth. If the holder of this policy shall become totally and permanently disabled, and shall thereby receive the benefits as provided herein, at the death of such policyholder, all rights or claims under the terms of this policy, whether the insured or the beneficiaries herein named, shall cease and terminate. But if the insured shall continue to pay all premiums, dues and assess-

ments on this policy during said disability, then the rights and interests of the beneficiaries shall be preserved, and after the death of the insured the beneficiaries will receive the monthly benefits as provided herein, not to exceed, however, the maximum amount in this policy, including the amount drawn by the insured during disability.

"Seventh. The terms 'total and permanent disability' as used in this policy shall be understood to mean such disability as shall render the insured totally incapable of doing, performing, managing or directing any service of any kind or character by which the insured might earn a livelihood; and that such disability is of such a character as to render recovery improbable. To determine whether such disability is permanent or not, the company reserves the right, if the proof is not conclusive, to defer payment of disability claims for three months after application and proofs are presented therefor. And in case such claim is allowed and paid and thereafter the claimant shall sufficiently recover as to be able to perform any service of any kind or character by which a livelihood can be earned, then said total and permanent disability benefits shall cease and terminate, and the amount so paid shall be charged against the maximum amount provided on the face of this policy as having been paid hereon."

What is total and permanent disability within the meaning of this policy? The phrase "manual labor, or business upon which he may depend for a livelihood," printed on the face of the policy is to some extent more liberal to the insured in the matter of employment or means of earning a livelihood than the words on the back of the policy, viz., "doing, performing, managing or directing any service of any kind or character, by which the insured might earn a livelihood."

[9] Where an insurance contract contains conflicting provisions or is otherwise ambiguous, it will be strictly construed against the company, and that construction will be adopted which will sustain rather than defeat the purpose of the contract, if it can be done without doing violence to the language employed, when fairly construed in the light of the situation of the parties to the contract. *Hay vs. Meridian Life & Trust Co.*, 101 N. E. 651-654; *Glens Falls Ins. Co. vs. Michael*, 167 Ind. 659-666, 667, 74 N. E. 964, 79 N. E. 905, 8 I. R. A. (N. S.) 708; *Northern Assur. Co., etc. vs. Carpenter*, 94 N. E. 779-781; *Iowa Life Ins. Co. vs. Haughton*, 46 Ind. App. 467-477, 87 N. E. 702; *Metropolitan Life Ins. Co. vs. Johnson*, 49 Ind. App. 233-242, 94 N. E. 785, and cases cited; *Neill vs. Order, etc.*, 78 Hun 255, 28 N. Y. Supp. 928.

The policy under consideration is a life insurance policy with certain provisions for burial and disability benefits. Most of the decided cases deal with accident policies which provide insurance for certain specified injuries or for disability rendering the

insured incapable of following his usual avocation. We find no case that is of controlling influence in deciding what is total and permanent disability within the meaning of this policy. The general principles applicable to the construction of such instruments and decisions in cases bearing some analogy to the one at bar must therefore be depended upon for guidance.

[10] Such a contract is to be reasonably construed so as to effectuate the purpose for which it was made. A fair and reasonable construction should be given to all the language employed, and in so doing we should consider the relation and situation of the parties, when the policy was issued, and ascertain the meaning upon which the minds of the contracting parties may reasonably be said to have met at that time. *Glens Falls Ins. Co. vs. Michael*, *supra*, 167 Ind. 677, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708.

[11] When so construed, the policy issued to appellee means that, in case the insured becomes totally and permanently disabled from following any occupation or engaging in any business from which he may by reasonable effort obtain a livelihood, he is entitled to payment as stipulated in the policy. Such employment or business is not necessarily limited to farming and coal mining, but, on the other hand, the policy must be construed in the light of the facts that must have been known to both the contracting parties when it was issued. The company insured appellee knowing that he was an illiterate laborer. So, taking the man as he was when the policy was issued and the claim for benefits presented, if from the injury and condition shown he was totally and permanently incapacitated from earning a livelihood, the company could not rightfully refuse to pay, because of a mere possibility that by education or otherwise he might at some time become able to earn a living in some way or by some means not then available. Appellee would not necessarily be entitled to recover because of the loss of his hand, for the policy only gives him such right for total and permanent disability. The loss of one hand might or might not result in such disability.

[12] Whether he was or was not totally and permanently disabled within the meaning of the policy as above construed, considering all the evidence bearing on the question of disability, is a question of fact to be determined by the court or jury trying the case. *Turner vs. Fidelity & Casualty Co.*, 11 Mich. 425-429, 70 N. W. 898, 38 L. R. A. 529-535, 67 Am. St. Rep. 428, and notes.

In *Lobdill vs. Laboring Men's Mutual Aid Ass'n*, 69 Minn. 14, 16, 71 N. W. 696, 38 L. R. A. 537, 539, 65 Am. St. Rep. 542, the Supreme Court of Minnesota said: "The cases which have placed a construction upon the term 'total disability' might seem to be divided into two classes, viz., those which construe it literally in favor of the insured and those which construe it

strictly against him. * * * Any apparent conflict in the decisions may, however, be mostly reconciled in view of differences in the language of the policies and of the different occupations under which the parties were insured." The case then quotes with approval from Wolcott vs. United, etc., Co., 55 Hun, 98, 8 N. Y. Supp. 263, the following: "Total disability must, from the necessity of the case, be a relative matter and must depend largely upon the occupation and employment in which the party insured is engaged." One who labors with his hands might be so disabled by a severe injury to one hand as not to be able to labor at all at his usual occupation, whereas a merchant or a professional man might by the same injury be only disabled from transacting some kinds of business pertaining to his occupation. * * * All that the courts can do is to construe the contract which the parties have made for themselves; but in doing so they should give it a reasonable construction, so as, if possible, to give effect to the purpose for which it was made."

Cook on Life Ins. § 108, says: "Disability, as a condition on which the liability of the insurer becomes consummated, may, by the terms of the agreement, be limited to disability arising from injuries specified. And, when not thus limited, it is commonly limited to 'total' disability. Total disability must of necessity be a relative matter, depending largely upon the occupation and employment of the insured. In the absence of agreement to the contrary, it seems to be the rule that such disability consists in a total inability to earn a livelihood at any employment and to be not restricted to a particular employment or that in which the insured is engaged at the time of the injury. But it is also reasonably held that, to constitute total disability to labor, it is not necessary that the insured be incapacitated to do anything in the prosecution of a given employment but only that he be incapacitated to do all the substantial acts necessary to the prosecution of such employment."

In Hutchinson vs. Supreme Tent, etc., 68 Hun, 355, 359, 22 N. Y. Supp. 801, 803, the court considered an insurance contract which provided that, upon "total and permanent disability to perform or direct any kind of labor or business," the disabled member was entitled to the specified benefit, and said: "Here we have a definition or a description of the disability that would entitle the plaintiff to recover. It is not only permanent, but total, so as to be unable to perform or direct any kind of labor or business. It is not limited to the business in which the plaintiff was engaged at the time of his injury, but it is, in the broadest language possible to use, 'a total and permanent disability to perform or direct any kind of labor or business.' A total disability is ordinarily one of fact and is for the jury. It must be determined from the facts and circumstances disclosed

in each case. That which would be total disability in one case might not be in another. The loss of a hand by a lawyer might interfere but slightly in the transaction of his business or in the performance of his work, while to a man who had learned a particular trade, by which he had always earned his living, and was entirely ignorant of all other trades or business, it might prove to be a much more serious disability. Ordinarily the loss of the fingers of the hand does not constitute total disability from the performance of 'any kind of labor or business.'"

In *Baltimore & Ohio, etc., Co. vs. Post*, 122 Pa. 579, 600, 15 Atl. 885, 891, 2 L. R. A. 44, 47, the court said: "We also think the court below erred in its construction of the words 'total inability to labor,' contained in the constitution and by-laws. This was a relief association, not an accident insurance company. Its object was to relieve its members during the time when they were unable to work by reason of injury or sickness; hence if a member was injured in such a way that he could not longer earn a livelihood at the particular labor at which he was employed at the time of the accident, yet was capable of earning as much or more money in some other employment, it was certainly not the object of the association, as expressed by its charter and by-laws, that he should remain idle and draw benefits all his life." See, also, *Bliss on Life Ins.* § 403; 2 May on Insurance, §§ 522-523; *Young vs. Travelers' Ins. Co.*, 80 Me. 244, 13 Atl. 896; *Saveland vs. Fidelity & Casualty Co.*, 67 Wis. 174, 30 N. W. 237, 58 Am. Rep. 863.

In *Mutual Ben. Ass'n vs. Nancarrow*, 18 Colo. App. 274, 276, 71 Pac. 423, 424, the court had under consideration a policy which provided for benefits if the insured was "totally disabled and confined to his house" and said: "The words 'totally disabled,' as well as the words 'confined to the house,' must receive a reasonable interpretation. The purpose of the policy was to indemnify the plaintiff against loss occasioned by inability to attend to his work or business on account of sickness. The total disability contemplated by the instrument does not mean a state of absolute helplessness. The plaintiff might have been able to walk, he might have been able to ride on the cars to his physician's office, and still have been entirely incapacitated for work or business. In view of the object of the contract, we think that, if he was so incapacitated, he was totally disabled within the meaning of the policy." See, also, *James vs. U. S. Casualty Co.*, 113 Mo. App. 622, 88 S. W. 125, 126; *Thayer vs. Standard Life & Accident Co.*, 68 N. H. 577, 41 Atl. 182; *U. S. Casualty Co. vs. Hanson*, 20 Colo. App. 393, 79 Pac. 176, 177; *Turner vs. Fidelity & Casualty Co.*, supra, 112 Mich. 425, 70 N. W. 898, 38 L. R. A. 529, 67 Am. St. Rep. 428; *Genest vs. L'Union St. Joseph*, 141 Mass. 417, 6 N. E. 380; *Saveland vs. Fidelity, etc., Co.*, 67 Wis. 174, 30 N. W. 237, 58 Am. Rep. 863.

[13] The further question of the interest of the wife, the beneficiary named in the policy, remains to be considered. The policy provides that, in case of disability of the insured entitling him to payment therefor, liability to the beneficiary at the death of the insured shall cease and terminate unless the payment of dues and assessments shall be continued during such disability, in which event the rights of the beneficiary under the policy shall be preserved, and she will be entitled to payment at the death of the insured, according to the terms of the policy, deducting from the total sum stipulated in the policy the amount paid to the insured under the disability clause of the contract.

The contract makes no provision for a change of beneficiary, and she would undoubtedly have the right to continue the payment of dues and assessments during disability of the insured in order to preserve her rights under the policy. She therefore had a vested interest in the policy that could not be divested by any refusal of the company to pay a claim for disability benefits, or by any renunciation of the contract, or by a suit to which she was not a party. Indiana National Life Ins. Co. vs. McGinnis (Sup.) 101 N. E. 289-293; Kline vs. National Benf. Ass'n, 111 Ind. 462-465, 11 N. E. 620, 60 Am. Rep. 703; Farra vs. Braman, 171 Ind. 529-540, 86 N. E. 843.

The third paragraph of complaint which we have held good does not disclose that the wife of appellee has any interest in the policy, but the policy was introduced in evidence, and her interest must be considered in passing on the motion for a new trial. The denial of liability to appellee and repudiation of the contract, as alleged, could only affect appellee and would not affect or change the situation of the beneficiary. Therefore on the facts of this case there could not be a recovery equal in amount to the full value of the policy. The amount of the recovery is therefore erroneous, being too large.

A suit for damages for a breach or the repudiation of the whole contract of insurance could not be sustained without making the beneficiary a party to the suit or in some legal way showing that she had ceased to have any interest in the policy. The insured could of course maintain a suit on the policy for any accrued benefits due him, independent of the beneficiary, for the policy expressly gives him such right. The motion for a new trial should also have been sustained for the reason that the decision of the court is not sustained by sufficient evidence. The only evidence of a denial of all liability or renunciation of the insurance contract is the letter written by appellant to appellee in answer to his claim for benefits. We have already construed this letter in passing on the sufficiency of the second paragraph of the complaint. It does not show a denial of all liability or a repudiation of the contract. It recognizes the contract but denies liability for the particular claim then presented by

appellee, claiming that his injury did not permanently and totally disable him within the meaning of his policy. There is therefore a total failure of proof to show a denial of all liability or a repudiation of the contract without which there can be no recovery on the third paragraph of complaint. We have considered all the questions presented by the briefs.

[14] Other questions suggested by the assignment of errors and the motion for a new trial have not been discussed and are therefore waived.

The judgment is therefore reversed, with instructions to the lower court to sustain the motion for a new trial, to permit the parties to amend their pleadings if desired, and for further proceedings not inconsistent with this opinion.



**NATIONAL LIFE & ACCIDENT INS. CO. vs. O'RIEN'S
EX'X ET AL.***

(Court of Appeals of Kentucky.)

1. INSURANCE—ACCIDENT INSURANCE—LIABILITY—EXTENT OF DISABILITY.

Under an accident insurance policy, providing an indemnity for loss of time resulting directly from bodily injuries wholly and continuously disabling the insured from performing every duty pertaining to any business or occupation, the insurer was liable if the disability was such as to prevent insured from prosecuting any kind of business pertaining to his occupation or to prevent him from doing all the substantial acts required of him in his business.

(For other cases, see Insurance, Cent. Dig. § 1310; Dec. Dig. § 524.)

2. INSURANCE—ACTIONS ON POLICIES—SUFFICIENCY OF EVIDENCE.

In an action on an accident insurance policy, evidence *held* to show that insured was wholly and continuously disabled so as to prevent him from performing any substantial work or duty pertaining to his business or occupation during the whole period for which a recovery was sought.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

3. PLEADING—REPLY—ADMISSION—ACTIONS ON POLICIES.

In an action on an accident insurance policy to recover the stipulated indemnity for seventy-eight weeks, in which the answer denied that insured was disabled except for a comparatively short period for which he presented a claim and was paid, a reply, alleging that insured thought he had recovered and made a claim for such short period, but further alleging that a few days thereafter he had to again take to his bed by reason of the original injury, from which time until his death he was wholly and continuously disabled, did not admit that the disability was not continuous from the time of the acci-

* Decision rendered, Oct. 24, 1913. 159 S. W. Rep. 1134.

dent to his death, or that, during the few days during which insured thought he had recovered, he was not so disabled as to be incapable of following his usual occupation or of doing any other work.

(For other cases, see Pleading, Cent. Dig. §§ 354, 355; Dec. Dig. § 177.)

4. INSURANCE—ACTIONS ON POLICIES—PLEADING.

In an action on an accident insurance policy in which the petition alleged that the disability resulting to insured from the accident complained of wholly and continuously disabled and prevented him from performing every duty pertaining to his business and occupation from the date of the accident to the date of his death, it was unnecessary for the reply to deny an allegation of the answer that the disability was not continuous from the date of the accident to the time of the death.

(For other cases, see Insurance, Cent. Dig. §§ 1554, 1626, 1628, 1629; Dec. Dig. § 641.)

5. INSURANCE—ACCIDENT INSURANCE—LIABILITY—NATURE OF DISABILITY.

The liability of an insurer under an accident insurance policy for the stipulated indemnity for a disability lasting seventy-eight weeks was not defeated by a provision of the policy that in the event of disability due to accident or illness resulting wholly or in part, directly or indirectly, from Bright's disease, the limit of liability should be an indemnity for not exceeding four weeks at the stipulated rate, where it did not appear that insured had Bright's disease for more than four weeks before his death.

(For other cases, see Insurance, Cent. Dig. §§ 1309, 1316, 1317; Dec. Dig. § 530.)

6. APPEAL AND ERROR—REVIEW—INVITED ERROR.

Defendant could not complain of an instruction requested by it, or that such instruction was in conflict with another given by the court.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.)

7. INSURANCE—ACCIDENT INSURANCE—NOTICE—WAIVER.

Where the holder of an accident insurance policy in his lifetime, and his executrix after his death, demanded payment of the stipulated indemnity for disability lasting seventy-eight weeks, and the insurer denied any liability except for a small amount which it tendered, the denial of liability and the tender of such amount was a waiver of the formal notice of the disability to which, under other circumstances, the insurer would have been entitled.

(For other cases, see Insurance, Cent. Dig. §§ 1391, 1392; Dec. Dig. § 559.)

8. INSURANCE—ACTIONS ON POLICIES—QUESTIONS FOR JURY.

In an action on an accident insurance policy, the question of notice of the disability, as well as the question of a waiver thereof, by the insurer, is ordinarily one of fact for the jury.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

9. APPEAL AND ERROR—INSTRUCTIONS—NECESSITY OF REQUEST.

Where, in an action on an accident insurance policy, defendant requested no instruction as to the failure of insured or his executrix to give

formal notice of the disability, it could not complain of the court's failure to instruct the jury on such subject.

(For other cases, see Appeal and Error, Dec. Dig. § 216; Trial, Cent. Dig. § 627.)

Appeal from Circuit Court, Franklin County.

Action by Pat O'Brien's executrix and others against the National Life & Accident Insurance Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Chas. H. Morris and M. M. Logan, both of Frankfort, for Appellant.

L. W. Morris, of Frankfort, for Appellees.



**COCHBURN vs. HAWKEYE COM'L MEN'S ASS'N.—NU-
GENT ET AL. vs. HAWKEYE COM'L MEN'S ASS'N.***

(Supreme Court of Iowa.)

**1. APPEAL AND ERROR—MOTION TO DISMISS—B R I E F S—
FAILURE TO FILE—TIME.**

A motion to dismiss or affirm because appellant's brief was not filed in time will not be granted where a proper excuse is presented and no prejudice resulted to the appellee from the delay.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.)

**2. PLEADING—P E T I T I O N O F I N T E R V E N T I O N—V E R I F I C A-
T I O N.**

Where the original petition was not verified, a petition in intervention was not fatally defective for want of verification.

(For other cases, see Pleading, Cent. Dig. §§ 859-863, 886½; Dec. Dig. § 290.)

**3. APPEAL AND ERROR—P E T I T I O N O F I N T E R V E N T I O N—
MOTION TO STRIKE—DENIAL—PREJUDICE.**

In an action on an accident certificate, N. intervened, claiming the proceeds by assignment from plaintiff, after which defendant moved to dismiss the action because of a settlement between it and plaintiff prior to the intervention. This motion was sustained as to the original plaintiff but denied as to intervenor after which he commenced an original action against the insurer based on the same claim with which the petition of intervention was consolidated without objection. Held, that the court's refusal to strike the petition of intervention was not prejudicial to defendant, even if erroneous.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4069-4074; Dec. Dig. § 1036.)

* Decision rendered, Nov. 17, 1913. 143 N. W. Rep. 1006.

**4. INSURANCE—ACCIDENT POLICY—ACTIONS BY ASSIGNEE
—VENUE.**

Code, § 3499, provides that insurance companies may be sued in the county in which the contract of insurance was made, or in which the loss insured against occurred, or, in case of insurance against death or disability, in the county of the domicile of the insured at the time the loss occurred, or in the county of plaintiff's residence. *Held*, that such section was applicable to an accident insurance company, and that an action by an assignee of the proceeds of a certificate was properly brought in the county where the assured resided at the time of the loss.

(For other cases, see *Insurance*, Cent. Dig. § 1992; Dec. Dig. § 811.)

**5. ATTORNEY AND CLIENT—GENERAL ATTORNEY—KNOWL-
EDGE—IMPUTATION TO CLIENT.**

Knowledge or notice of facts acquired by the general attorney of an accident insurance company in the business of the company while endeavoring to settle a loss was in law knowledge of or notice to the company.

(For other cases, see *Attorney and Client*, Cent. Dig. §§ 92, 93, 1020; Dec. Dig. § 104.)

**6. INSURANCE—KNOWLEDGE OF DIRECTORS—IMPUTATION
TO CORPORATION.**

Where an alleged director of defendant corporation furnished a printed copy of defendant's by-laws, on which his name appeared with others as directors, the authenticity of which by-laws was not denied, and he testified that he had attended a director's meeting when the matter of assignment of a claim against defendant to N. had been considered, the evidence sufficiently showed his official connection with defendant to impute his knowledge of the alleged assignment to defendant.

(For other cases, see *Insurance*, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.)

**7. WITNESSES—PRIVILEGE—ATTORNEY—CONFIDENTIAL
COMMUNICATIONS.**

An attorney for an accident insurance company was not privileged to refuse to identify a printed copy of the company's by-laws, under Code, § 4608, forbidding the disclosure by an attorney of confidential communications intrusted to him during the course of his employment.

(For other cases, see *Witnesses*, Cent. Dig. §§ 759, 760, 762; Dec. Dig. § 204.)

**8. WITNESSES—CONTRADICTION—WITNESS CALLED BY
PLAINTIFF.**

While plaintiff may not attack the reputation of his own witness for truth and veracity or moral character, he is not bound by his testimony, but may show a different state of facts by other witnesses; the weight of the testimony being for the jury.

(For other cases, see *Witnesses*, Cent. Dig. § 1268; Dec. Dig. § 402.)

**9. INSURANCE—ACCIDENT POLICY—EVIDENCE—MANIFESTA-
TIONS OF PAIN.**

In an action by an assignee of a claim on an accident policy, the evidence of a physician who treated insured for his injury, showing the progress of the patient, the condition of the injury at different times, and manifestations of pain which the physician observed, was prop-

erly admitted when limited to its bearing on the extent of the injury and disability.

(For other cases, see Insurance, Cent. Dig. §§ 1996-1998; Dec. Dig. § 815.)

10. EVIDENCE — BEST AND SECONDARY EVIDENCE — CONTENTS OF WRITING.

Where N., claiming under an assignment of a claim on an accident certificate, showed that the original assignment had been sent to defendant, and was no longer in his possession, and also proved notice to defendant to produce the same, which it had failed to do, the court properly admitted parol evidence of its contents.

(For other cases, see Evidence, Cent. Dig. §§ 595-599; Dec. Dig. § 179.)

11. INSURANCE—ACCIDENT POLICY—ASSIGNMENT OF CLAIM—VARIANCE.

Notice of injury first given to defendant under an accident policy was a claim for a lost eye, compensation for which was fixed at a stated sum. Suit was thereafter instituted for injury to the eye resulting in disability for a period claimed. Preliminary proofs stating the first claim were admitted in evidence over objections of defendant that the action was not for such loss but for disability. *Held*, that the cause of action was the injury, the measure of recovery being determined by its results, and that the evidence was therefore not error.

(For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.)

12. INSURANCE—ACTION ON CERTIFICATE—QUESTION FOR JURY—INSTRUCTIONS.

Assured, having a claim under an accident certificate, assigned the same to N., who testified that the assignment directed the insurer to pay him the amount coming to assured under the certificate. Assured testified that the assignment was given to N. to enable him to collect a claim for loss of assured's eye, and also that he gave an order to N. authorizing him to collect the claim by its number; that afterwards, finding his injury not so great as it first believed, the claim was changed to correspond with the actual injury, and to make a claim for disability for a specified period. *Held*, that the scope of the assignment was a question for the jury, which was properly submitted under instructions requiring them to find that there had been an assignment to N. of assured's right to recover on the certificate, and that defendant had notice of the assignment before it settled with assured, in order to entitle plaintiff to recover.

(For other cases, see Insurance, Cent. Dig. §§ 2009, 2010; Dec. Dig. §§ 825, 826.)

Appeal from District Court, Webster County; C. E. Albrook, Judge.

Action on certificate of accident indemnity. From a verdict and judgment for P. F. Nugent, plaintiff and intervener, defendant appeals. Affirmed.

Bradford & Johnson, of Marshalltown, and Healy & Healy, of Ft. Dodge, for Appellant.

Kelleher & O'Connor, of Ft. Dodge, for Appellee.

P. F. Nugent, of Ft. Dodge, pro se.

HEFNER vs. FIDELITY & CASUALTY CO. OF NEW YORK.*

(Court of Civil Appeals of Texas. El Paso.)

1. INSURANCE—CONSTRUCTION OF POLICY—ACCIDENT INSURANCE—“TOTAL DISABILITY.”

A provision in an accident insurance policy for indemnity for total disability that prevents the assured from performing any and every kind of duty pertaining to his occupation requires only such disability as prevents the performance of any substantial part of his duties.

(For other cases, see Insurance, Cent. Dig. § 1310; Dec. Dig. § 524.)

(For other definitions, see Words and Phrases, vol. 8, pp. 7010-7012.)

2. INSURANCE — ACTIONS ON POLICIES — QUESTIONS FOR JURY—ACCIDENT INSURANCE—TOTAL DISABILITY.

Evidence that an attorney was prevented by an injury from doing anything that required continuous physical effort, that he was unable to do any work in the library or conduct the trial of a long drawn out case, is sufficient to take to the jury the question whether his disability was total within a clause in an accident insurance policy providing indemnity for total disability.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

3. INSURANCE—NOTICE OF LOSS—TIME FOR NOTICE—REASONABLE TIME.

A delay of ten months in giving an accident insurance company notice of an accident is unreasonable per se, under a clause of the policy requiring notice to be given as soon as may be reasonably possible.

(For other cases, see Insurance, Cent. Dig. §§ 1328-1336; Dec. Dig. § 539.)

4. INSURANCE—NOTICE OF LOSS—TIME FOR NOTICE—EFFECT OF DELAY.

Compliance with the requirement of an accident insurance policy that notice be given as soon as may be reasonably possible is a condition precedent to recovery under the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1328-1336; Dec. Dig. § 539.)

On Rehearing.

5. INSURANCE—ACTIONS ON POLICIES—SUFFICIENCY OF EVIDENCE — ACCIDENT INSURANCE — IMMEDIATE DISABILITY.

In an action by an attorney upon an accident insurance policy for the indemnity provided therein for immediate, continuous, and total disability, evidence held to show that the disability of the insured resulting from the accident, while total within the meaning of the policy, was not immediate.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

6. INSURANCE—NOTICE OF LOSS—TIME FOR NOTICE—EXCUSE FOR DELAY.

The fact that physicians who attended a person accidentally injured at

* Decision rendered, June 5, 1913. On rehearing, Nov. 11, 1913. 160 S. W. Rep. 380.

tributed his condition to disease, and not to the accident, does not excuse a failure to give the company notice of the accident as soon as reasonably possible, as required by the policy..

(For other cases, see Insurance, Cent. Dig. §§ 1328-1336; Dec. Dig. § 539.)
Mc Kenzie, J., dissenting.

Appeal from District Court, Reeves County; S. J. Isaacs,
Judge.

Action by T. J. Hefner against the Fidelity & Casualty Company of New York. Judgment for defendant, and plaintiff appeals. Affirmed.

J. W. Parker and Hefner & Cooke, all of Pecos, for Appellant.
Nealon, Neill & Thomason, of El Paso, for Appellee.

CASUALTY, SURETY AND MISCELLANEOUS.**SUPREME COURT OF WISCONSIN.**

KRESGE

vs.

MARYLAND CASUALTY CO.*

1. INSURANCE—LIABILITY INSURANCE—RISKS COVERED—“ALTERATION”—“ADDITION”—“STRUCTURE.”

Under a policy insuring the holder against liability for injuries to persons while in its store, and providing that additions to, alterations in, or the construction of, any building or structure were not covered thereby, vestibules inclosing about 25 or 30 square feet of floor space, installed to protect employees in the cold weather, which, although more elaborate, were of the same general nature as storm doors and windows, were not an “addition,” which is an enlargement or extension to include additional space, an “alteration,” which means a substantial change, nor a “structure” which is applied to a building of some size, an edifice.

(For other cases, see Insurance, Cent. Dig. § 325; Dec. Dig. § 168.)

(For other definitions, see Words and Phrases, vol. 1, pp. 360-365; vol. 1, pp. 175-177; vol. 7, pp. 6700-6702; vol. 8, p. 7806.)

2. INSURANCE—CONSTRUCTION OF CONTRACT—CONSTRUING AGAINST INSURER.

Where ambiguity occurs in an insurance policy prepared by the insurer, the words are to be read most favorably to the insured.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

3. PARTIES—BRINGING IN NEW PARTIES.

Under St. 1911, § 2610, requiring the court to bring in additional parties when a complete determination of a controversy cannot be had without their presence, or where the subject-matter of the controversy is such that persons not before the court have such an interest therein as requires them to be made parties for their protection in an action on a policy insuring against liability for injuries, it was not an abuse of discretion to refuse to bring in a third party claimed to be responsible for the injuries involved, and against whom the insurer claimed a right of subrogation, whether or not the court in its discretion might have made it a party, since the controversy between the parties to the action could be settled without its presence, and, as it would not be concluded by the result reached, it was not necessary that it should be a party for its own protection.

(For other cases, see Parties, Cent. Dig. §§ 77-82; Dec. Dig. § 51.)

Appeal from Circuit Court, Racine County; William B. Quinlan, Judge.

Action by S. S. Kresge against the Maryland Casualty Com-

* Decision rendered, Oct. 28, 1913. 143 N. W. Rep. 668.

pany. From a judgment for plaintiff, defendant appeals. Affirmed.

On April 25, 1910, the defendant issued and sold to the plaintiff a certain policy of insurance, by the terms of which the defendant agreed to indemnify plaintiff for a period of twelve months from the date of the policy against loss from liability for damages on account of injuries accidentally suffered by any person while within or upon the premises of the plaintiff's retail store at 313-315 Grand ave., Milwaukee, liability of the defendant being limited to \$5,000 for injuries to any one person. On November 19, 1910, one Emily Easson entered plaintiff's store through one of the main entrances thereof, and while passing along the aisle of said store tripped or stumbled over a tool box, thereby sustaining injuries. Thereafter, on August 22, 1911, said Emily Easson commenced an action against the plaintiff to recover damages for the injuries sustained. On November 28, 1911, plaintiff compromised and settled the claim of said Emily Easson, paying to her \$2,500. This action was brought by the plaintiff against the defendant to recover \$3,132.47, damages sustained by reason of defendant's alleged breach of its agreement. The complaint alleged, among other things, that plaintiff gave immediate notice to the defendant of the happening of the injuries to said Emily Easson, but that the defendant repudiated liability under its policy of insurance and refused to defend the action brought against the plaintiff. Defendant's answer denied liability on the ground that the injuries mentioned in the complaint were not within the risk covered by the policy of insurance. The answer further alleged that the plaintiff was not liable to respond in damages for said injuries, because they were the result of contributory negligence on the part of the injured person and were caused by the negligence of an independent contractor, to wit, the Northwestern Furniture Company, which company was employed by the plaintiff to make additions and alterations to its store, which work was in process at the time of the injuries to said Emily Easson. The store building of the plaintiff had a frontage of 50 feet and a ground floor area of 9,500 square feet. In the front there were three large windows separated by two entrances, which entrances were provided with double swinging doors on the inside. Because such doors did not afford sufficient protection to the employees in cold weather, it was decided to install two vestibules, each having two swinging doors therein. These vestibules inclosed about 25 or 30 square feet of floor space. The Northwestern Furniture Company was engaged to do the work, and it apparently was one of its employees who left the tool box in such a position that Mrs. Easson stumbled over it and was injured. A motion by the defendant to cause the Northwestern Furniture Company to be made a party to the above-

entitled action was denied, with costs. From a judgment in favor of the plaintiff and against the defendant for \$3,394.05 damages and costs, this appeal is taken.

Lines, Spooner, Ellis & Quarles, of Milwaukee, for Appellant.
Miller, Mack & Fairchild and J. G. Hardgrove, all of Milwaukee, for Respondent.

BARNES, J. (after stating the facts as above). Two questions are involved on this appeal: (1) Is the defendant liable on the policy sued on? (2) Did the court err in refusing to make the Northwestern Furniture Company a party defendant?

[1] The policy contained the following provision: "Additions to or alterations in, or the construction of any building or structure, or elevator, are not covered under this policy." It is claimed by the appellant that the putting in of an extra set of doors in each of the entrances and the creation of a vestibule at each entrance is either an "addition" to or an "alteration" in the building, or else the "construction of a structure." It is conceded that the extra set of doors at each entrance was intended for winter use only, and that but one set would be maintained at each entrance during the summer months. The operation was somewhat more elaborate than the usual putting in place of storm doors and windows, but was of the same general nature. We think it is quite plain that the vestibule did not constitute an addition to the building. The word "addition" as there used should be held to mean enlargement or extension, so as to include additional space. Neither do we think that a temporary device put in place to keep out the wind and cold in the winter time should be held to constitute an alteration of the building itself within the meaning of the policy. There was no substantial change made in the structure, if indeed there was any change at all, and we think the word "alteration" should be held to mean a substantial change. *Bigelow vs. Worcester*, 169 Mass. 390, 48 N. E. 1; *Commonwealth vs. Hayden*, 211 Mass. 296, 97 N. E. 783. It is also apparent that the putting in place of these doors was not the "construction of a structure." In its usual and ordinary sense, the word "structure" is applied to a building of some size, an edifice, Webster's Dict.

[2] The policy was prepared by the defendant, and where ambiguity occurs therein, the words are to be read most favorably to the insured. *Bakalars vs. Continental Casualty Co.*, 141 Wis. 43, 46, 122 N. W. 721, 35 L. R. A. (N. S.) 1241, 18 Ann. Cas. 1123; *French vs. Fidelity & Casualty Co.*, 135 Wis. 259, 265, 115 N. W. 869, 17 L. R. A. (N. S.) 1011; *Summerfield vs. Assurance Co. (C. C.)* 65 Fed. 295, 297; *Gillet vs. Bank of America*, 160 N. Y. 549, 55 N. E. 292. It seems reasonably certain that what the defendant aimed to protect itself against was the danger incident

to the construction work and the wrecking of buildings, and not to a trifling act such as is here involved.

[3] The remaining question is, Did the court err in refusing to make the Northwestern Furniture Company a party defendant? The appellant insists that it has a right of subrogation, and that, having such right, it is entitled to have the Furniture Company before the court to the end that it might be bound by any judgment rendered which adjudicated that the plaintiff was legally liable for the injuries sustained by Mrs. Easson. Section 2610, Stats. 1911, makes it obligatory on the court to bring in additional parties when a complete determination of the controversy cannot be had without their presence, or where the subject-matter of the controversy is such that persons not before the court have such an interest therein as requires them to be made parties for their due protection. It is obvious that the case does not fall within the compulsory provisions of this section. The controversy between the parties to this suit can be fully and finally settled without the presence of the Furniture Company. It is not necessary that the latter company should be made a party for its protection, because it is not concluded by the result reached on any question litigated in the present action in which it is interested. We do not pass upon the question whether the court in the exercise of its discretion might not have made the order asked for. We simply hold that it is not an abuse of discretion to refuse to do so. Neither do we decide whether or not the right of subrogation exists. The Furniture Company is interested in that question, and is entitled to be heard upon it at the proper time.

Judgment affirmed.

Siebecker, J., took no part.

SUPREME COURT OF MINNESOTA.**MANN ET AL.****vs.****EMPLOYERS' LIABILITY ASSUR. CORP.*****1. INSURANCE—ACTION ON EMPLOYERS' LIABILITY INSURANCE POLICY.**

Plaintiffs in an action upon an employers' liability insurance policy held precluded by their conduct from asserting that defendant was estopped or had waived its right to defend on the ground that the loss was not covered by the terms of the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1027, 1030, 1035, 1040, 1057; Dec. Dig. § 388.)

2. INSURANCE—ACTION ON EMPLOYERS' LIABILITY INSURANCE POLICY—SUFFICIENCY OF EVIDENCE.

Direction of verdict for defendant held proper.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

Appeal from District Court, Ramsey County; Hascal R. Brill, Judge.

Action by John Mann and others against the Employers' Liability Assurance Corporation. A verdict was directed for defendant, and from denial of a new trial plaintiffs appeal. Affirmed.

C. D. O'Brien, F. G. Ingersoll, and M. J. Doherty, all of St. Paul, for Appellants.

Butler & Mitchell, of St. Paul, for Respondent.

PHILIP E. BROWN, J.

Action on an employers' liability insurance policy issued by defendant to plaintiffs as copartners, to recover the amount of a judgment rendered against them for the death of an employee.

Plaintiffs gave defendant immediate notice of the accident, and thereupon defendant investigated and became conversant with all the facts. Thereafter, on November 2, 1910, the action was commenced which resulted in judgment against plaintiffs, and, they having immediately transmitted the summons and complaint to defendant company, its attorney took charge of the case, interposed an answer, and subsequently conducted the defense on the

* Decision rendered, Nov. 7, 1913. 143 N. W. Rep. 794. Syllabus by the Court.

trial, which terminated in a verdict for plaintiffs therein. An appeal to this court, with defendant's attorney as counsel, followed and resulted in a reversal, defendant paying the costs, and upon retrial in the district court, the same attorney acting as before, plaintiff therein prevailed and these plaintiffs were compelled to pay the judgment. About a year after the bringing of the action plaintiffs dissolved partnership, but plaintiff Mann continued to represent them in the matter of the litigation. Defendant claimed that forty-one days after the action was commenced, and more than six weeks before the first trial, it notified plaintiffs that their policy did not cover certain specifically excepted risks, and if judgment was awarded against them upon a liability within the exceptions mentioned it would not be responsible therefor, and advised them that such notice was given so they could be in a position to thoroughly protect their interests. Defendant further claimed that plaintiffs then consented to its conducting the litigation with the understanding that, if damages were awarded upon facts bringing the accident within the exceptions of the policy, defendant company would not be liable to reimburse them, and all subsequent acts of defendant in connection with the litigation were pursuant thereto. The recovery against plaintiffs proved to be within the exceptions, and the court, holding defendant's claims established, directed a verdict in its favor. Plaintiffs appealed from an order denying a new trial.

[1] 1. We must start with the proposition that there was no express contractual liability on defendant's part to pay plaintiffs any sum under the policy because of the judgment obtained against them. Consequently the burden rested on plaintiffs to establish a state of facts from which a liability might be implied by law. There are numerous cases holding that where an insurance company takes up the defense of an action, knowing the facts bring it within a risk exception, and, under the general agreements of the policy authorizing it to control litigation, conducts the case to the end, and nothing further appears, it will be deemed precluded, by the way of either estoppel or waiver, from taking a position inconsistent with the one previously assumed and denying liability. *Empire State Surety Co. vs. Pacific Nat. Lumber Co.*, 200 Fed. 224, 118 C. C. A. 410; *Employers' Liability Assurance Corporation vs. Chicago, etc., Coal & C. Co.*, 141 Fed. 962, 73 C. C. A. 278; *Royle Mining Co. vs. Fidelity & Casualty Co.*, 126 Mo. App. 104, 103 S. W. 1098. So, also, under like circumstances, the company has been held estopped where it conducted the defense down to the trial and then withdrew, leaving assured no reasonable opportunity to prepare his own defense. *Glens Falls Portland Cement Co. vs. Travelers' Ins. Co.*, 162 N. Y. 399, 56 N. E. 897. And our decisions are in line with the general holding. *Tozer vs. Ocean Accident, etc.*,

Corporation, 94 Minn. 478, 103 N. W. 509; *Id.*, 99 Minn. 290, 109 N. W. 410. If, however, the trial court's conclusion upon defendant's contentions is sustainable in point of fact, which we will consider later, the cases cited are clearly distinguishable from the present one; for plaintiff's assent to the status assumed by defendant with regard to the litigation by the notice of nonliability referred to and thereafter, when measured by the same legal standard of responsibility for acts indicated by the grounds of the decisions cited and which they seek to apply as against defendant would equally estop them from doing the identical thing which they deny defendant's right to do, namely, repudiation of the effect of conduct. The doctrine of equitable estoppel prevents this, and in effect we have an estoppel against an alleged estoppel, which sets the matter at large. *Tappan vs. Huntington*, 97 Minn. 31, 106 N. W. 98, 16 Cyc. 748. Plaintiffs are thus relegated to the provisions of the policy, which concededly give no right of recovery. Nor is this result affected by the dissolution of the partnership.

[2] 2. Does the evidence sustain the court's position upon the facts? We hold it does, for after an attentive consideration of the record we are satisfied that no other conclusion could fairly be reached. Plaintiffs' claims rest substantially upon the testimony of a single witness, whose recollection of the transactions involved was so vague and his accounts thereof so contradictory as to be of slight probative value except as corroborative of defendant's version. His claim that he did not understand defendant's repudiation of liability has not been overlooked, but cannot be sustained in view of the fact that he was conversant with our language and experienced in business. Taken as a whole, the evidence was insufficient to warrant a verdict for plaintiffs.

Order affirmed.

SUPREME COURT OF NEW YORK.

KRICKL

vs.

OCEAN ACCIDENT & GUARANTEE CORPORATION, LTD.*

INSURANCE—BURGLARY INSURANCE—ACTION—ALLEGATIONS OF COMPLAINT.

The complaint in an action on a larceny insurance policy was fatally defective for not alleging that the property stolen was that covered by the policy.

(For other cases, see Insurance, Cent. Dig. § 1319; Dec. Dig. § 632.)

Appeal from City Court of New York, Special Term.

Action by Charles A. Krickl against the Ocean Accident & Guarantee Corporation, Ltd. From an order of the City Court denying defendant's motion for judgment on the pleadings, it appeals. Order reversed, and motion granted.

Argued October term, 1913, before Seabury, Guy, and Bi-jur, JJ.

Joseph L. Prager, of New York City (Sidney S. Levine, of New York City, of counsel), for Appellant.

George Young Bauchle, of New York City, for Respondent.

SEABURY, J.

This is an appeal from an order denying defendant's motion for judgment on the pleadings. The action was brought to recover upon a policy insuring plaintiff against loss by burglary, larceny, or theft of certain articles mentioned in said policy, a copy of which is annexed to the complaint. The complaint alleges that while said contract of insurance was in force and effect "certain property belonging to plaintiff's wife" was stolen. The court below denied the motion, on the ground that the plaintiff was entitled under the policy to bring the action in his own name, even though the property belonged to his wife. The terms of the policy justified this ruling. The vice of the complaint lies in its failure to allege that the property stolen was the property covered by the policy of insurance. Such an allegation was essential to the statement of a cause of action. Rodi vs. President, etc., 19 N. Y. Super. Ct. 23; Krank vs. Continental Insurance Co., 50 Misc. Rep. 144, 100 N. Y. Supp. 399.

Order reversed, with \$10 costs and disbursements, and motion granted, with \$10 costs, with leave to plaintiff to serve an

* Decision rendered, Oct. 23, 1913. 143 N. Y. Supp. 750.

amended complaint within six days after service of a copy of the order entered herewith, with notice of entry in the City Court, upon payment of costs in this court and the court below. All concur.

LIFE.**UNITED STATES DISTRICT COURT.**

N. D. Ohio, E. D.

IN RE YOUNG. (No. 4,135.)*

1. BANKRUPTCY—ASSETS—INSURANCE.

A policy on a bankrupt's life for the benefit of his children or their executors, etc., contained no right to change the beneficiary, and as to surrender values provided that at the end of ten years or at the end of each period of five years thereafter the company would pay to the persons designated a cash value only on surrender and release thereof by such person or persons within thirty days after the end of such period. The policy was issued April 3, 1895, and at the time bankruptcy intervened there would be no right to surrender until April 3, 1915. *Held*, that such policy was not controlled by Gen. Code Ohio, § 9398, providing that policies of life insurance made payable to a married woman or any person in trust for her or for her benefit, etc., shall inure to her benefit, but was nevertheless not such a policy as would pass insured's contingent interest therein to his trustee in bankruptcy.

(For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.)

2. BANKRUPTCY—ASSETS—LIFE INSURANCE POLICY—INSTALMENT ENDOWMENT.

A policy on the bankrupt's life, providing that at the expiration of twenty years there should be paid to the insured or his assigns \$250 annually until twenty installments had been paid, or at his election such deferred installments would be commuted and paid in one stipulated sum, but that if he should die within the twenty-year period the installments should be paid to his widow or their stipulated commuted sum might be paid on the written request of insured and his beneficiary, the right to change the beneficiary being reserved to him, was a speculative endowment policy solely for the bankrupt's benefit and passed to his trustee in bankruptcy.

(For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.)

3. BANKRUPTCY—ASSETS—LIFE INSURANCE POLICIES—EXEMPTIONS.

Gen. Code Ohio, § 9398, exempts policies of insurance payable to a married woman or to any person in trust for her or for her benefit. Bankr. Act July 1, 1898, c. 541, § 6, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), declares that the act shall not affect the allowance of exemptions to bankrupts prescribed by state laws in force at the time of the filing of the petition, and section 70 (30 Stat. 565 [U. S. Comp. St. 1901, p. 3541]) provides that when any bankrupt shall have any insurance policy which has a cash surrender value it shall be surrendered to the trustee, or unless he shall pay or secure such surrender value for the benefit of his creditors. *Held*, that the policies, having a cash surrender value payable to the bankrupt's wife whether

* Decision rendered, Oct. 2, 1912. 208 Fed. Rep. 373.

he had the right to change the beneficiary or not, were exempt and not assets passing to the trustee.

(For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.)

In the matter of bankruptcy proceedings of A. S. Young. Petition for William H. Vodrey, as trustee, to sell at private sale the right of the bankrupt in certain policies of insurance. Granted in part.

J. H. Sampliner, of Cleveland, Ohio, for Petitioning Creditors.
Brookes & Thompson, of East Liverpool, Ohio, for Bankrupt.
W. B. Hill, of East Liverpool, Ohio, for Trustee.

KILLITS, D. J.

The matter before us is the petition of William H. Vodrey, trustee of the bankrupt, to be allowed to sell at private sale the right of the bankrupt in ten policies of insurance upon his life, against the claim of the bankrupt and his wife, Ella S. Young, that neither of said policies are in any way a part of the bankrupt's estate. The petition has been referred to us for decision by the referee, who advises that it be allowed as to all of the policies with the exception of one in the amount of \$5,000, in force for sixteen years, which has apparently no cash surrender value and in which the insured does not retain the right to change the beneficiary, who is his wife.

With the exception of a policy for \$3,000, payable to the children of the bankrupt, which must be separately treated, a consideration of the remaining policies demands a construction of section 9398 of the General Code of Ohio, which reads:—

"A policy of insurance on the life of any person, duly assigned, transferred, or made payable to a married woman, or to any person in trust for her or for her benefit, whether such transfer is made by her husband or other person, shall inure to her benefit, and that of her children, independently of her husband or his creditors, or of the person effecting or transferring the policy or his creditors."

This statute, as far as we are able to ascertain, has received no construction by the courts of Ohio.

The situation, of course, also demands that this state statute be weighed in connection with sections 6 and 70a of the Bankruptcy Law, which two sections in their pertinent parts read as follows:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile." Section 6.

"Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to

the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets." Section 70a.

Since the decision of *Holden vs. Stratton*, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018, there is no longer a question that the paragraph quoted from section 10a qualifies or limits the terms of section 6 of the Bankruptcy Act. It is the holding of the court, in substance that section 70a deals only with policies of insurance which are not exempt under the state law, and the question simplifies itself to be whether, under a proper construction of the state statute quoted, the policies now to be considered are exempt.

The nine policies under consideration fall into four classes:—

(1) Those which are made payable to Ella S. Young, insured's wife, wherein the bankrupt expressly retains the right to change the beneficiary at any time without her consent, and is granted the right to receive at his sole option at any time the stipulated surrender value. Of these there are three.

(2) The second class embraces four policies, each having a cash surrender value at certain periods which may be taken by the insured without the consent of the beneficiary. No right to the insured is reserved to change the beneficiary.

(3) In the third class is a policy in the Northwestern Mutual Life Insurance Company, termed by the company an "installment endowment," which provides that, in consideration of the annual premium to be paid for a period of twenty years, at the expiration of such term there will be paid to the insured or his assigns the sum of \$250 yearly until twenty installments have been paid, or at his election such deferred installments will be commuted and paid to him in one stipulated sum, but that if he should die within the twenty-year period these twenty annual installments shall be paid to the bankrupt's wife, Ella S. Young, or their stipulated commuted sum may be paid upon the written request of the insured and his beneficiary. The right is also expressly reserved to the insured to change the beneficiary at any time during the continuance of the policy. This policy has been in force for about fifteen years.

(4) The fourth class embraces a policy in the sum of \$3,000 of the nature known as a twenty-payment life, which has continued for about seventeen years, in which the beneficiaries are "the children of said insured equally, or their executors, administrators or assigns." No right to change beneficiary has been reserved to the insured, and as to surrender values the provision is as follows:—

"At the end of ten years from the date above written or at the end of each period of five years thereafter. * * * this company will pay to the person or persons thereunto designated

in the aforesaid application a cash value therefor * * * only upon surrender and release hereof by such person or persons within thirty days after the end of such period."

In the application the insured designated himself as the person to whom the surrender value should be paid in his lifetime.

[1] It is plain that the policy last referred to is not controlled by the state statute above quoted, nor by any other statute of the state, except that by law (section 9393, Code Ohio) the insurable interest of bankrupt's children is recognized. The only ground for requiring this policy to be considered as part of the bankrupt's estate, to be administered upon in behalf of his creditors, is the limited right given him in the terms quoted above to surrender the policy and receive the stipulated value, and the question before us is whether that option is one which he may be compelled to exercise or which he might assign to be exercised by some one else.

The precise question arose in the case of *Townsend's Assignee vs. Townsend*, 127 Ky. 230, 105 S. W. 937, 16 L. R. A. (N. S.) 316, except that in that case was involved a particular statute of Kentucky (Ky. St. § 655) which we do not consider essential to the determination. Speaking of a somewhat similar option enjoyed by the insured, the court says that it is such an estate as "under a general deed of assignment will not pass by law to the assignee for creditors. The interest is remotely contingent and incapable of being valued. It is so woven in with other considerations, such as his conception of duty to his children and the exercise of judgment in their behalf and in his own, that there can be no certain way of estimating the value of that interest or the disposing of it without destroying or injuring other interests under the policy which are primary to those of the insured. The option is baldly to let his children have the provision for their future support or to take it himself. Whether he should take it himself involves the exercise of judgment, discretion, and his own conception of duty. No one else has the right to exercise it for him nor against the children. No one else could be actuated by the same impulse."

The policy in question was issued April 3, 1895. By the terms quoted above, only within thirty days after April 3, 1910, the insured could have surrendered the policy and taken its surrender value. By its terms it has at this time no surrender value, nor did it have any at the time of the application of the trustee, February 9, 1912, for an order of sale. Only during the thirty days succeeding April 3, 1915, may this option be exercised next again by the insured. Without the provisions just quoted, the policy would be an ordinary life policy in which case nothing would pass to the trustee. Remington on Bankruptcy, § 1004.

It would seem that good policy is opposed to the sacrifice of the interests of insured's children and to the control of the in-

sured's option, which depends upon the pull of natural affection for its exercise and which can be exercised only at a period quite remote from the orderly administration of this estate to put this policy to sale for whatever sum the contingent interest of the estate, if any there is, might bring. Under a strict reading of section 70a, which we have quoted, it is open to grave doubt whether this policy is within the statute.

Without the consent of the children at this time the company issuing the policy can pay no surrender value, nor is there any method whereby under the contract the value at this time may be ascertained. By no process can the insured be compelled to exercise at this time an option that is not open to him for three years, nor can the company be compelled to pay any amount upon the policy. One who would attempt to buy the assumed rights of the insured or of the estate under this policy must take into consideration the contingency that all his interest may be lost by the death of the insured prior to April 3, 1915, and he must burden himself with the necessity of moving immediately after that date to the exercise of the option, which then only otherwise is conferred upon the insured. These considerations suggest to the court that the estate has no salable interest in this policy and that the petition of the trustee to that end should be denied.

[2] The policy put by the court in the third class, in our judgment, passes to the trustee. It is such a policy as that considered by the court in *Re Herr* (D. C.) 182 Fed. 716, 25 Am. Bankr. Rep. 142, and *In re Loveland* (D. C.) 192 Fed. 1005.

In the *Herr* Case the court say:

"While the wife, as it stands, is the contingent beneficiary, the policy is under the complete control of the bankrupt, and he may change the situation at any moment, and realize upon it, without regard to her, either giving it up and getting the surrender value, or continuing it with a newly designated beneficiary, just as he may choose."

In fact, this is only contingently a life insurance policy at all. It is purely a speculative endowment, an investment for the sole benefit of the bankrupt, provided he survives the limited period of the policy, which is well within his expectancy of life. To permit this sort of contract to be exempt from application upon bankrupt's debts under the assumed application of the section of the Ohio statute which we have quoted above would be, it seems to us, to open a wide avenue for, if not a concealed fraud upon, his creditors, at least an improvident disposition of his income to their injury and his benefit. We are content to sustain the referee's recommendation and to direct the sale of this policy on the application of the trustee on the authorities just cited.

[3] The trustee justifies his recommendation that the remaining seven policies in classes 1 and 2 be ordered sold, upon the

authority of *In re Loveland*, *supra*, where the exact point, so far as policies of class 1 are concerned, has been decided. This case was decided with reference to the Massachusetts law, which provides that:—

“Every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband or by any other person, and whether the assignment or transfer is made by her husband or by any other person shall inure to her separate use and benefit, and to that of her children.”

This statute is not vitally different in the particulars under consideration from that of Ohio the application of which we are considering; but the District Court of the United States for Massachusetts, in so deciding this case upon its facts, is at variance with the great current of authority and is supported by no other decision to which we have been cited, the case of *In re Herr*, as we have observed, being upon facts comparable to the policy which we have put in class 3 rather than those in class 1.

The exact question involved as to these seven remaining policies, as to whether or not they are exempt under provisions similar to those of Ohio, has been frequently passed upon. The cases on this subject are: *In re Orear*, 189 Fed. 888, 111 C. C. A. 150, 26 Am. Bankr. Rep. 521, a decision by the Circuit Court of Appeals of the Eighth Circuit, construing a statute of Missouri; *In re Booss* (D. C.) 154 Fed. 494, 18 Am. Bankr. Rep. 658, construing a statute of Pennsylvania; *In re Pfaffinger* (D. C.) 164 Fed. 526, 21 Am. Bankr. Rep. 255, construing a statute of Kentucky; *In re Whelpley* (D. C.) 169 Fed. 1019, 22 Am. Bankr. Rep. 433, construing a statute of New Hampshire—the provisions of which several statutes are substantially identical with those of Ohio and in each of which cases the policies under consideration were similar to those in class 1 in the case at bar; and *In re Johnson* (D. C.) 176 Fed. 591, constituting a similar statute of Minnesota with reference to a policy similar to those in class 2. These authorities are all adverse to the decision of the District Court of Massachusetts (192 Fed. *supra*) upon which the referee relies, and control us in a construction of the Ohio statute, which reserves the interest of the beneficiary in these seven policies and holds them as exempt thereunder from administration in behalf of the bankrupt's estate.

It is to be observed that the conditions of the policies embraced in class 1 make a stronger case for the trustee's application than those attached to the policies embraced in class 2, and that the authorities exempting the policies in the first class are a *fortiori* applicable to those in the second class. *In Re Orear*, *supra*, the court says:—

"The primary purposes of such policies is still to insure against death and usually for the benefit of those dependent upon the insured, and when a modern policy is made, as in this case, payable upon the death of the insured to his wife by name as beneficiary, the fact that the insured may have the right to change the beneficiary or enjoy certain collateral rights in his lifetime does not make it any the less a policy of insurance made by an insurance company expressly for the benefit of the wife of the insured within the meaning of the statute in question. * * * The property is not only exempt, but never passed to him (the trustee) and is not his. The statute, while in the nature of an exemption law, is more than that; it declares that this property shall inure to the separate benefit of the wife. Ordinary exemption laws leave the full right and title to the property in the debtor. This law declares that this policy shall inure to the separate benefit of the wife of Jacob W. Derr."

This language is equally applicable to the conditions in this case, having reference to the terms of the Ohio statute, which provides that a policy of insurance made payable to a married woman "shall inure to her benefit and that of her children independently of her husband or his creditors or of the person effecting or transferring the policy or his creditors." To grant the request of the trustee is to absolutely extinguish all interest of the beneficiary in these contracts; it is to wipe out all provision that the bankrupt has made for his wife and family. If that may be done, then section 9398, General Code of Ohio, and section 6 of the Bankruptcy Law are to no purpose.

An order may be entered in this case granting the right of sale to the trustee of the estate's interest in the policy issued January 14, 1897, by the Northwestern Mutual Life Insurance Company, No. 361,713, and denying the application as to each of the others.



COURT OF ERRORS AND APPEALS OF NEW JERSEY.

IN RE PRUDENTIAL INS. CO. OF AMERICA.*

1. COURTS—JURISDICTION OF SUPREME COURT—ORDERS OF COURTS AND JUDICIAL OFFICERS.

P. L. 1913, p. 152, permits any stock life insurance corporation of the state to acquire its own capital stock for the benefit of its policy-holders and to convert itself into a mutual company and constitutes the Chancellor of the state the legislative agent to administer such proceedings. *Held*, that the Chancellor's order in such proceeding

* Decision rendered, Oct. 24, 1913. 88 Atl. Rep. 970.

was reviewable by certiorari out of the Supreme Court and not by appeal to the Court of Errors and Appeals, regardless of the fact that it was made by the Court of Chancery.

(For other cases, see Courts, Cent. Dig. §§ 670-676; Dec. Dig. § 236.)

2. COURTS—JURISDICTION—SUPREME COURT.

The Supreme Court is the sole depository of the remedial writ of certiorari which by force of Const. art. 10 § 1, it cannot be required to share with another tribunal.

(For other cases, see Courts, Cent. Dig. §§ 670-676; Dec. Dig. § 236.)

Motion by the Prudential Insurance Company of America to dismiss an appeal taken by certain of its stockholders from an order appointing three disinterested persons to appraise the value of its capital stock made by the Chancellor pursuant to an act permitting such company to acquire the capital stock thereof for the benefit of its policyholders and to convert itself into a mutual life insurance company. Appeal dismissed.

John R. Hardin and Robert H. McCarter, both of Newark, for Appellants.

Richard V. Lindabury and Edward D. Duffield, both of Newark, for Appellee.

John W. Griggs, of Paterson, and Merritt Lane, of Jersey City, for Policyholders.

GARRISON, J.

This is a motion by the Prudential Insurance Company of America to dismiss an appeal taken by certain of its stockholders from an order appointing three disinterested persons to appraise the value of its capital stock, made by the Chancellor of this state pursuant to the provisions of an act entitled "An act to permit any stock life insurance corporation of this state to acquire the capital stock thereof for the benefit of its policyholders and to convert such stock life insurance corporation into a mutual life insurance corporation." P. L. 1913, p. 152.

This enactment provides a special statutory proceeding designed to accomplish the object expressed in its title and to that end constitutes the Chancellor of this state as the legislative agent through whose instrumentality such proceeding shall be administered.

Speaking generally, the act in question provides for the condemnation of the capital stock of a stock life insurance company for the purpose of fixing the price at which such stock may be acquired by such company and for the various other steps looking to the acquisition of such stock and the transformation of such company into a mutual life insurance company. Greater particularity is not required; it being sufficient for present purposes to say that the administration of this statutory scheme is cast by the Legislature upon the Chancellor of this state or its Court of Chancery, a distinction which, if it exists under our Constitution, is of no practical moment upon the present motion.

The constitutionality of this statutory proceeding is challenged

in limine by the owners of stock effected thereby ; the method of such challenge being the taking of an appeal from the initial order made by the Chancellor in the course of such statutory proceeding directly to this court. The propriety of this appeal is now challenged by the corporation at whose instance the legislative machinery was set in motion.

Normally statutory proceedings of this nature are reviewed by the Supreme Court by virtue of its prerogative writ of certiorari, and there is nothing in the nature or object of the present proceeding to take it out of this general rule. So that if the legislative agent designated in the present statute had been, let us say, the Commissioner of Banking and Insurance, there would not be the slightest doubt but that certiorari was the proper remedy by which to review his action under such statute or to test the validity of the statute under which such action was had.

Such supposititious case would be indistinguishable in principle from the ordinary proceeding to condemn land in which a justice of the Supreme Court as the legislative agent designated in the statute appoints three disinterested freeholders to appraise the value of the land sought to be taken by compulsory purchase from the owner thereof, who may by the writ of certiorari challenge in limine the right of the condemning agent to acquire his land or the validity of the statutory authority under which such right is claimed.

If, therefore, a different method of review obtains in the present statutory proceeding, as it actually is, it must be solely because of the official character of the agency selected by the Legislature to administer it, or rather because of the nature of the judicial duties ordinarily performed by such agent in some other capacity, for in no other respect does the actual case differ from the supposititious one.

[1] If such a distinction is valid, it establishes the novel and highly important doctrine that the method by which a statutory proceeding shall be reviewed depends not upon the nature of such proceeding but upon the personnel of the agency selected to administer it, or rather upon the character of the duties that are performed by such legislative agent in some other official capacity, so that, if such legislative agent be also a court of general jurisdiction, the remedy under such doctrine would be by an appeal which, in the case of the common pleas, would go to the Supreme Court, in the case of the circuit court would go either to the Supreme Court or to this court, and in the case of the Court of Chancery would go directly to this court by an appeal in equity. It is apparent that by force of such doctrine the writ of certiorari is entirely shorn of its prerogative character since the Legislature may in every case by the selection of one legislative agent rather than another determine that the method of review shall be other than by certiorari.

It is evident, therefore, that the present motion involves considerations of the most important and far-reaching character.

That such doctrine receives no support upon general principle from our existing institutions is shown by the fact that the action of the common pleas in granting or refusing a tavern license is and always has been reviewable by certiorari, notwithstanding that such legislative agent is a court of general jurisdiction, and the same is true of proceedings to lay out public roads and other statutory proceedings brought before that court as a legislative agent.

The same is true of the circuit court, and the case of *East Orange vs. Hussey*, 70 N. J. Law, 244, 57 Atl. 1086, in which this fact is established, is not only destructive of the supposed doctrine we are considering but is also necessarily dispositive of the motion now before us.

That was a motion to dismiss a writ of error that brought up to this court an order of the circuit court dismissing proceedings in a municipal improvement. The writ of error was dismissed, and the ground therefor and the line of reasoning pursued by this court were that the statutory proceeding was one that could be reviewed by the Supreme Court upon certiorari; that it was beyond the power of the Legislature to require the Supreme Court either to forego such writ or to share it with another tribunal, which it would be required to do if the order of the circuit court was made in its judicial capacity; that the Legislature would not be presumed to have attempted to do that which it was powerless to do; and hence that the designation of the circuit court as participant in the statutory proceeding was as a legislative agent which was not modified or affected by the fact that the agency thus employed was in another capacity a court of general jurisdiction.

[2] One headnote to the opinion in that case is: "The Supreme Court is the sole depository of the remedial writ of certiorari, which, by force of article 10, § 1, of the Constitution, it cannot be required to share with another tribunal." Another is: "A writ of error having been returned, bringing up a statutory proceeding, and a motion to dismiss such writ having been heard, held, that such proceeding, regardless of the agencies that took part in it, is reviewable by certiorari only and not by writ of error."

Applying these established rules to the motion now before us, it necessarily follows that the present statutory proceeding is reviewable by certiorari only, regardless of the fact that one of the agencies that took part in it is the Court of Chancery, and that that circumstance cannot require the Supreme Court to forego its writ of certiorari or to share it with this court, which it would be required to do if an aggrieved party may review such statutory proceeding in this court upon a direct appeal.

The case cited so conclusively settles the principles pertinent to the present motion that their further discussion is neither requisite nor justifiable. The appeal is dismissed.

SUPREME COURT OF NEW JERSEY.

OSTMANN

vs.

SUPREME LODGE, KNIGHTS AND LADIES OF HONOR.*

1. INSURANCE—CONTRACT—FORFEITURE CLAUSE—CONSTRUCTION.

A contract between a fraternal beneficial association and a member thereof provided that if the member should engage in the occupation of saloonkeeper "the membership of such person and all rights and benefits thereunder shall be thereby forfeited, and the relief fund certificate held by the member shall become null and void and he shall be liable to trial therefor as for an offense, and upon conviction thereof, shall be expelled from the order," and that "such forfeiture, if the facts upon which the same is based are established by evidence, shall be a complete defense to any action on the relief fund certificate, * * * even though charges have not been made or trial had of such member as hereinbefore provided." Held, that the provision rendering void the relief fund certificate for engaging in the prohibited occupation is self-executing.

(For other cases, see Insurance, Cent. Dig. §§ 1917, 1918; Dec. Dig. § 756.)

2. INSURANCE — CONTRACT — FORFEITURE CLAUSE — CONSTRUCTION.

Where the contract between a fraternal beneficial association and a member thereof is by its terms rendered void if the member engages in the occupation of "bartender, saloonkeeper, hotel proprietor who personally dispenses spirituous or malt liquors," the contract is rendered void by the member engaging in the occupation of keeping a saloon where malt liquors are sold, and the question whether he *personally* dispensed liquors is immaterial.

(For other cases, see Insurance, Cent. Dig. §§ 1893, 1894; Dec. Dig. § 748.)

3. INSURANCE—CONTRACT—FORFEITURE—WAIVER.

The unconditional receipt of dues and assessments by a fraternal beneficial association from a member with knowledge upon the part of the association that the member was engaged in a prohibited occupation, constitutes a waiver of the forfeiture of the benefit certificate.

(For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.)

* Decision rendered, Nov. 20, 1913. 88 Atl. Rep. 949. Syllabus by the Court.

4. INSURANCE — CONTRACT — WAIVER OF FORFEITURE — BURDEN OF PROOF.

Where the holder of a benefit certificate in a fraternal association was not engaged in a prohibited occupation when the contract was made, but subsequently became engaged in such, and, in a suit to recover on the contract, the plaintiff sought to show a waiver of the forfeiture by the acceptance of dues and assessments by the association, the burden of showing knowledge upon the part of the association that he was engaged in a prohibited occupation when his dues were received is upon the plaintiff.

(For other cases, see *Insurance, Cent. Dig.* § 1303; *Dec. Dig.* § 517.)

Appeal from District Court of Hoboken.

Action by Katherine Ostmann against the Supreme Lodge, Knights and Ladies of Honor. From judgment for plaintiff, defendant appeals. Reversed and new trial ordered. Argued June term, 1913, before Garrison, Trenchard, and Minturn, JJ.

Beecher & Bedford, of Newark, for Appellant.

Isadore H. Brand and John H. Sheridan, both of Hoboken, for Appellee.

TRENCHARD, J.

The plaintiff, who is the widow of Adolph A. H. Ostmann, deceased, brought this action to recover the sum of \$500, claimed to be due her under a "Relief Fund Certificate" issued by the defendant order to her husband in his lifetime.

[1] The judge of the District Court, sitting without a jury, rendered judgment for the plaintiff. We are of opinion that the judgment cannot be sustained. The defense was that the relief fund certificate had been rendered void because decedent engaged in an occupation prohibited by the contract. It is conceded that the contract, upon which plaintiff's right to recovery rests, consists of the certificate and the by-laws of the order adopted in 1903. The certificate issued by the order to the decedent in 1905 certified that he was entitled to the rights and benefits of membership and to participate in the relief fund of the order to the amount of \$500, which sum should, at his death, be paid to his wife. The by-laws of the order prohibit members of the relief fund from engaging in any of the following occupations: "Bartenders, saloonkeepers, hotel proprietors who personally dispense spirituous or malt liquors," etc.—and further provided that if any member shall engage in any such prohibited occupation, "the membership of such person and all rights and benefits thereunder shall be thereby forfeited, and the relief fund certificate held by the member shall become null and void and he or she shall be liable to trial therefor as for an offense, and upon conviction thereof, shall be expelled from the order."

The contract, as thus constituted, it will be seen, deals with two classes of rights, namely, the right to membership in the order, and the right to the benefits of the relief fund. By it, when a member engages in a prohibited occupation, two things result, namely: (1) the relief fund certificate becomes null and void

automatically ; and (2) expulsion from the order upon conviction of the offense.

That the provision rendering void the relief fund certificate is self-executing, without trial, conviction, and expulsion is made quite plain when we examine the next following by-law which is as follows: "The receipt by a subordinate lodge of such member's assessment and dues, or either, before the facts upon which the forfeiture of membership is based, and for which the member may be tried, shall become known to the Supreme Protector or Supreme Secretary, shall not be taken as a waiver of such forfeiture; but such forfeiture, if the facts upon which the same is based are established by evidence, shall be a complete defense to any action on the relief fund certificate issued to such member, even though charges have not been made or trial had of such member as herein before provided."

[2] The learned trial judge found that the deceased member was not a bartender or hotel proprietor. He, however, found that, after making the contract in question, the decedent became engaged in the occupation of keeping a saloon where malt liquors were sold but he added that he found that the decedent did not *personally* dispense such liquors, and concluded that decedent had not engaged in a prohibited occupation.

We think the question whether he *personally* dispensed liquors was immaterial. Bartenders and saloonkeepers constitute two classes of prohibited occupations. "Hotel proprietors who personally dispense spirituous or malt liquors" constitute the third class. The words "who personally dispense spirituous or malt liquors" qualify only hotel proprietors. No doubt facility of access to liquors was the prime consideration. The judgment for the plaintiff seems to have been rested by the trial judge upon the erroneous finding that the deceased member had not engaged in a prohibited occupation.

[3] But there is another phase of this case. While the provision for forfeiture of the relief fund certificate is self executing, yet the unconditional receipt of dues and assessments with knowledge upon the part of the order that the member in question was engaged in the prohibited occupation would constitute a waiver of the forfeiture. 29 Cyc. 785, 194.

[4] The trial judge found, and the proofs seem to justify the finding, that the deceased member, after engaging in the prohibited occupation, continued to pay his dues and assessments up to the time of his death. But upon the question whether this was with knowledge upon the part of the order that he had thus engaged in the prohibited occupation there was no finding, and indeed we do not observe any evidence upon that point. No doubt, in view of the admitted fact that he was not engaged in any prohibited occupation when the contract was made, the burden of showing knowledge upon the part of the order that he was a

saloonkeeper when they received his dues was upon the plaintiff.

The judgment will be reversed, and a new trial ordered, limited, however, to the question whether the defendant order was in ignorance of the fact that the decedent had become engaged in the prohibited occupation when it accepted the dues. Rules 131 and 147 of the revised Supreme Court rules of 1913 apply.

Let judgment be entered accordingly.



SUPREME JUDICIAL COURT OF MAINE

FRYE

vs.

EQUITABLE LIFE ASSUR. SOCIETY OF THE UNITED STATES.*

1. INSURANCE — LIFE INSURANCE — STATUTE — CONSTRUCTION.

Rev. St. c. 49, § 104, prohibiting life insurance companies from discrimination in the amount of premiums for policies, and providing that no company or agent shall make any contract of insurance other than as plainly expressed in the policy, etc., taken from act April 2, 1891, entitled "an act to prohibit discrimination in life or endowment insurance policies," and imposing a penalty for violating the act, merely prohibits rebates and discriminations and does not interfere with the practice of making an application for the policy a part thereof by reference only.

(For other cases, see Insurance, Cent. Dig. §§ 308-311; Dec. Dig. § 151.)

2. INSURANCE—LIFE INSURANCE—CONTRACTS—CONSTRUCTION.

Under an application for a life policy and the policy issued thereon which provided in case of default in premiums after three years for a paid-up policy for as many twentieths of the original policy as complete annual premiums had been paid and that the policy might be surrendered for a nonparticipating paid-up policy provided the policy was returned to insurer within six months after default, otherwise the policy should cease and premiums paid should be forfeited to insurer, the failure of insured to return the policy within the specified time after default deprived him of his rights, unless the provisions in the policy were waived or insurer was estopped from denying a liability for the failure to return the policy within the time.

(For other cases, see Insurance, Cent. Dig. § 931; Dec. Dig. § 364.)

3 INSURANCE—LIFE INSURANCE—STIPULATIONS—VALIDITY.

Under Rev. St. c. 49, § 93, providing that notices required by a policy may be served on insurer's agent, who shall be regarded as in the place of insurer, a stipulation in a life policy that no person, except one

* Decision rendered, Dec. 12, 1913. 89 Atl. Rep. 57.

of the executive officers named, shall be authorized to alter contracts or waive forfeitures is void, and an agent may waive a requirement of the policy for its return to insurer to enable insured to demand a right given by the policy, and insurer is bound thereby.

(For other cases, see Insurance, Cent. Dig. §§ 953-955; Dec. Dig. § 376.)

4. INSURANCE—LIFE INSURANCE—STIPULATIONS—WAIVER.

A life policy provided for a paid-up policy on default in premiums after three years for as many twentieths of the original policy as complete annual premiums had been paid, on condition that insured within six months returned the policy to insurer. The insured paid six annual premiums, and at the maturity of a subsequent premium went to the office of insurer's agent who informed insured that the policy was good for as many twentieths as had been paid in, and that insured did not need any other policy. Insured relied on the agent's statement and did not return the policy and made no further effort to obtain any other policy. *Held*, that the act of the agent operated as a waiver of the requirement to return the policy, and insurer was bound thereby and insured could avail himself of the right given by the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1026, 1027, 1030, 1035, 1040, 1057; Dec. Dig. § 388.)

Report from Supreme Judicial Court, Cumberland County, at Law.
Action by John J. Frye against the Equitable Life Assurance Society of the United States. Cause reported. Action to stand for trial.

Argued before Savage, C. J., and Spear, Cornish, King, Bird, and Philbrook, JJ.

M. P. & H. P. Frank, of Portland, for Plaintiff.
Symonds Snow, Cook & Hutchinson, of Portland, for Defendant.

PHILBROOK, J.

This is an action in assumpsit coming before this court on report. October 29, 1891, the defendant company issued to the plaintiff a so-called free tontine policy of life insurance for \$2,500. On this policy the plaintiff was to make an advance payment of \$31.63, and was to pay an annual premium of \$119.50 on or before the 29th day of January in each year following for a period of 20 years, after which no further payments were required. Among the list of privileges contained in the policy is to be found the following: "It provides for a paid-up policy after three years for as many twentieths of the original policy as complete annual premiums have been paid." The plaintiff paid six annual premiums only, and when the seventh annual premium became due, he went to the office of F. H. Hazelton, who was in charge of the company's office in Portland and acting as its agent, according to the testimony of the plaintiff, "and spoke to him in regard to not continuing the policy." After some conversation Mr. Hazelton expressed a desire to see the policy and the plaintiff went to his office and got it. When the policy had been examined by Mr. Hazelton, he remarked, according to the plaintiff's testimony: "This is a different policy from what I thought it was, this is good

for as many twentieths as you have paid in when it matures, you don't need any other policy." The plaintiff further testified that fully relying upon that statement he did not return the received policy which he held, and made no further effort to obtain any other policy. Under the choice of six methods of settlement provided in the policy and available at the completion of the tontine period of 20 years, the plaintiff claimed that he was entitled to six-twentieths of the surrender value of the policy, said surrender value being, as he says, \$1,672, together with the surplus then apportioned by the society, which surplus, the plaintiff says, then was, or ought to have been, \$836. Upon refusal of the society to pay the claim, this suit was brought, the writ being dated August 7, 1912.

[1] The policy in the case contains the words, "In consideration of the written and printed application for this policy, which is hereby made a part of this contract," and the first controversy is whether the application is to be admitted in evidence and whether certain stipulations contained in the application are to be given any weight or consideration in determining the rights of the parties in this action. The plaintiff cites Rev. St. c. 49, § 104, "Nor shall any such company or any agent, subagent, broker, or any other person, make any contract of insurance or agreement as to such contract, other than as plainly expressed in the policy." Since the application was not "plainly expressed in the policy" the plaintiff urges that it cannot be introduced in evidence or be regarded as any part of the contract between the parties. This act was passed by the Legislature of 1891 and was approved April 2, 1891 (Laws 1891, c. 128). The policy in question, being dated October 29, 1891, was issued after this act became effective. The sentence above quoted, and relied upon by the plaintiff, is only part of the act. By reference to the original we observe its title to be "An act to prohibit discrimination in life or endowment insurance policies." The entire act is as follows:

"Section 1. No life insurance company doing business in this state, shall make or permit any distinction or discrimination in favor of individuals between insureds of the same class and expectation of life, in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts which it makes. Nor shall any such company or any agent, subagent, broker, or any other person, make any contract of insurance or agreement as to such contract, other than as plainly expressed in the policy issued thereon. Nor shall any such company or agent, subagent, broker, or any other person, pay or allow, or offer to pay or allow, as inducement to insurance, any rebate of premium payable on the policy; or any special favor or advantage in the dividends or other benefit to accrue thereon; or any valuable consideration or induce-

ment whatever, not specified in the policy contract of insurance.

"Sec. 2. Any person or corporation violating any provisions of this act shall be fined not more than two hundred dollars; and it is hereby made the duty of the insurance commissioner, on the conviction of any person acting as such agent, subagent, or broker, to revoke the certificate of authority issued to him at once, for the term of one year."

Thus it may be properly inferred that rebating and discrimination in the insurance business had reached such conditions and had assumed such proportions as to become an evil worthy to be deemed a statutory misdemeanor, and of such grave import as to not only call for punishment in the way of a fine but also for a suspension of a civil privilege for a year. It was plainly the intent of the Legislature to provide against secret agreements regarding rebates and discrimination that inspired the act of 1891 upon which plaintiff relies, but of which he only quotes a portion. In drafting contracts it is a long-established practice, sanctioned by the common law, to refer to some other existing document or writing specifically, and make it, by such reference, a part of the contract thus being drafted. The contention of the plaintiff is that in case of insurance contracts or policies this practice is forbidden with reference to any and all elements of the contracts between the parties. We cannot adopt the view that the Legislature intended a provision so far-reaching as that claimed by the plaintiff, but rather the intention was that no agreement should be made regarding rebates or discriminations in the insurance contract unless the same was "plainly expressed in the policy." This act was construed in *State vs. Schwarzchild*, 83 Me. 261, 22 Atl. 164, where Mr. Justice Haskell says: "The true construction of the Act of 1891, c. 281, is to require life insurance companies to give equal terms to those persons whom it insures that are of the same class, and to stipulate the terms of insurance in the policies, and to accord to none any other." This construction is in harmony with the view for which we are now contending.

The plaintiff also agrees that the application in this case is for a policy other than the one he holds, but the real controversy demands a broad view and we are not disposed to give great weight to this argument, since the case clearly shows that the policy upon which the plaintiff relies was in fact issued as a result of the application in question.

Believing that we have declared the true meaning of the Legislature in the act of 1891, as applied to this case, and that if the lawmaking body had intended such a fundamental change as that contended for by the plaintiff, or would abrogate an established and convenient method of legal precedent, it would have used language leaving no room for doubt, we admit the application as a part of the contract between the parties in this case.

[2] The list of privileges in the policy already referred to, pro-

viding for a paid-up policy, must therefore be examined in connection with the application. In the latter, under the heading "Privileges," we find, "If premiums upon the policy, for not less than three consecutive years of assurance, shall have been duly received by the society, and default shall be made in payment of a subsequent premium, the policy may be surrendered for a non-participating, paid-up policy, for the entire amount which the full reserve on the policy, according to the present legal standard of the state of New York, will then purchase as a single premium, calculated by the regular table for single premium policies, now published by the society; providing, that the policy be returned to the society duly receipted within six months after the date upon which the last premium in default has fallen due; otherwise the policy shall cease and determine and all premiums paid thereon shall forfeit to the society." The receipted policy not having been returned within such six months, and no such paid-up policy having been obtained, the defendant society says that the plaintiff has no cause of action. To this the plaintiff replies by citing *Chase vs. Phoenix Mutual Life Insurance Co.*, 67 Me. 85, and by calling attention to the statements of Mr. Hazelton, already quoted herein, and to Rev. St. c. 49, § 93, by virtue of which he says that agents of an insurance company are to be "regarded as in the place of the company in all respects," and also that "the company is bound by their knowledge of the risk and of all matters connected therewith."

Before we compare the case at bar with *Chase vs. Insurance Co.*, *supra*, it may be observed that it has been claimed that in the latter case, decided more than thirty-six years ago, our court announced a position which was out of harmony with that taken by nearly all the other state courts in this Union, and out of harmony with that taken by the Supreme Court of the United States. We believe that those who make such a claim did not give the opinion in that case a careful and discriminating examination. As we shall endeavor to show, that case is in harmony with the views of other courts whose opinions are entitled to respect and will sustain our final conclusions upon the points now under discussion. In that case the policy contained the following: "It being understood and agreed, that if, after the receipt by the company of not less than two or more annual premiums, this policy should cease in consequence of the nonpayment of premiums, then, upon a surrender of the same, provided such surrender is made to the company within twelve months from the time of such ceasing, a new policy will be issued for the value acquired under the old one, subject to any notes that may have been received on account of premiums." In that case three annual premiums only were paid, the last payment being in December, 1869. Chase died December 28, 1873, not having surrendered his policy within the twelve months from the time when he ceased to pay premiums. The court gave judg-

ment against the company, and it has been held by critics of this judgment that our court did not give full force and effect to the twelve-month provision for return of the policy as a prerequisite to maintaining an action against the company. Those who so criticise seem to have overlooked a second provision in the Chase policy, distinct from the provision just above quoted, which was as follows: "If the said premiums shall not be paid at the office of the company, in the city of Hartford, Conn., or to an agent of the company, on his producing a receipt, signed by the president or secretary, on or before the date above mentioned, then, in every such case, the said company shall not be liable for the payment of the whole sum assured, but only for a part thereof, proportionate with the annual payments made as above specified, and this policy shall cease and determine." Mr. Justice Barrows, speaking for the court in the Chase Case, after referring to the label on the policy as being "nonforfeiting," said: "Stipulations for a forfeiture in a policy thus labeled should be strictly construed. We do not think the second express condition should be so construed as to make the right of the insured to recover such part of the sum as is 'Proportionate with the annual payments' which have been made, dependent upon the surrender of the policy within twelve months after the first failure to meet an annual payment and upon the reception of a new policy. If such had been the design of the provisions respecting the issue of new policies, it would have been easy to say so. But there is no such stipulation. The terms upon which the company will issue paid-up policies (which the insured would doubtless find more convenient and available to be used, as they often are, as security for a loan) are stated by themselves. There is no necessary connection between them and the second express condition, nor anything to indicate that the limited liability recognized in that condition is to be ignored, unless the insured surrenders the old and takes out a new policy. The meaning and effect of that condition seems to be that a failure to pay one of the annual premiums on or before the day specified will put an end to the contract for the whole sum, at the option of the insurers; and thereafterwards they will be liable only for such proportion thereof as the payments previously made bear to the whole amount of the premiums stipulated for." The able jurist further declared that it was upon "such a policy as this" that he based his views, and it is plain to be seen that judgment for the plaintiff in that case was the result of the second condition expressed in the policy and that the provision for a paid-up policy at the end of twelve months after failure to pay premiums was not overlooked or ignored, but on the other hand its full import was carefully considered. Now turning to the policy and application in the case at bar we find a contract differing from that in the Chase Case in several particulars. The policy *and application* in the present case "provides for a paid-up policy after three years for as many twentieths

of the original policy as complete annual premiums have been paid," but also provides that if "default shall be made in payment of a subsequent premium, the policy may be surrendered for a non-participating, paid-up policy," and adds "providing, that the policy be returned to the society duly receipted within six months after the date upon which the last premium in default has fallen due; otherwise the policy shall cease and determine and all premiums paid thereon shall forfeit to the society." Neither in this policy or application are to be found the second condition such as appeared in the Chase policy and upon which the court ordered judgment against the insurance company. It would seem that the plain terms of the contract in the case at bar, and the failure of the plaintiff to observe the terms imposed upon him by the contract would be decisive of the rights of the parties in this case unless some other element successfully intervened.

[3, 4] That such an element did intervene is now claimed by the plaintiff, by virtue of the alleged assurances of Mr. Hazelton and by virtue of the statute (Rev. St. c. 49, § 93). Of this statute also the plaintiff only quotes a portion, the entire section reading as follows:

"Sec. 93. All notices and processes which, under any law, by-law or provision of a policy, any person has occasion to give or serve on any such (foreign insurance) company, may be given to or served on its agent, or on the Commissioner, as provided in the preceding section, with like effect as if given or served on the principal. Such agents and the agents of all domestic companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk and of all matters connected therewith. Omissions and misdescriptions known to the agent shall be regarded as known by the company, and waived by it as if noted in the policy." Under this statute, the plaintiff claims that the statements of Mr. Hazelton, as agent of the company, are not only admissible in evidence, but that they constitute a waiver on the part of the defendant society to claim a return of the old policy, or act as an estoppel against the society to now deny liability on the ground that plaintiff had not complied with the terms of the contract.

This latter act upon which the plaintiff relies was adopted by the Legislature in 1870. We have examined with some care each case brought before this court, since that time, in which this statute has been examined and construed. In a large majority of those cases the contention has been with reference to the knowledge on the part of agents regarding the risk when the application for insurance was made. One case, however, *Day vs. Insurance Co.*, 81 Me. 244, 16 Atl. 894, seems to be decisive of the contention now under consideration. In that case, the policy required proof of loss to be submitted within a certain time after the fire, which was

not done. In excuse for not doing so the plaintiff introduced a letter from an agent of the company containing these words, "Make no move in the Day Case until I see you." Defendant took exceptions to the admission of the letter and also to the following instruction given by the presiding justice at nisi prius: "I say then further, if that letter was written by Mr. Robinson (the agent) for and in behalf of the company, and was by authority of the company, because what I am speaking of now must come from the company itself, and if from the other testimony, you are satisfied that there were negotiations going on between these parties from the time, or very near the time, within thirty days of the time of the loss, continued up to that time, that would be a waiver of notice entirely." The exceptions to the admission of the letter from the agent and to the above instructions were overruled. In that case Mr. Justice Walton, for the court, said: "It is claimed that the letter was inadmissible because, by the terms of the policy, it was declared that no act of any agent of the company, other than its secretary or president, shall be construed or held to be a waiver of a full and strict compliance with all the provisions of the policy. The policy does not contain such a provision. But we have no hesitation in declaring the provision illegal and void. Previous to the enactment of our present insurance law, policies had become so loaded down with provisos, limitations and conditions, that in many cases, they secured to the insured nothing better than an unsuccessful lawsuit in addition to the loss of his property. And one of the purposes of our present statute was to put an end to this evil. The statute declares that the agent of all insurance companies, foreign or domestic, shall be regarded as in the place of the company, in *all respects*, regarding any insurance effected by them; and that all provisions contained in any policy in conflict with any of the provisions of said chapter shall be null and void. * * * We think these provisions should not be limited in their application to the agents through whom insurance is effected, or to those whose names are borne upon the policies. We think they were intended to apply to all the agents of insurance companies; to agents appointed to investigate the circumstances attending fires and to adjust losses as well as to those through whom the insurance is effected."

In the case at bar, under the authority of *Day vs. Insurance Co.*, supra, it must be declared that the provision of the policy, "No person except one of the executive officers named above is authorized to make, alter or discharge contracts or waive forfeitures" is "illegal and void," and the act of Mr. Hazelton was not only a waiver of the requirement to return the old policy, but that the defendant company is bound by the waiver. In accordance with the stipulation in the report the entry must be:—

Action to stand for trial.

SUPREME COURT OF ILLINOIS.**DROMGOLD***vs.***ROYAL NEIGHBORS OF AMERICA.*****1. APPEAL AND ERROR—DETERMINATION—FINDING—CONSTRUCTION.**

Where the opinion of the Appellate Court, on reversing, made no finding of fact, but stated that the facts were undisputed it must be taken to have found the facts the same as in the trial court and to have reversed for error of law.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4273-4279, 4345-4347, 4348; Dec. Dig. § 1083.)

2. INSURANCE—MUTUAL BENEFIT INSURANCE—CONTRACT—APPLICATION AND BY-LAWS.

The application for a benefit certificate and the by-laws of the association are to be considered a part of the contract between it and a member.

(For other cases, see Insurance, Cent. Dig. § 1854; Dec. Dig. § 718.)

3. INSURANCE—RESTRICTION ON POWER OF AGENT—WAIVER.

Restrictions upon the power of an insurance agent to waive any of the conditions of the contract or upon the method of such waiver are themselves conditions of the contract, which may be waived the same as any other condition.

(For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.)

4. INSURANCE—BENEFICIARY ASSOCIATION—FORFEITURE—WAIVER.

Conduct on the part of an association, amounting to a recognition of a member's claim to the continuing rights of membership, will relieve him from the consequences of his default, and an acceptance of an assessment without condition waives all the previous known grounds of forfeiture.

(For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.)

5. INSURANCE—LOCAL LODGE—AGENCY FOR SUPREME LODGE.

The subordinate lodge or council is the agent of the supreme lodge or council, notwithstanding declarations in the by-laws to the contrary.

(For other cases, see Insurance, Cent. Dig. § 1838; Dec. Dig. § 697.)

6. INSURANCE—MUTUAL BENEFIT INSURANCE—AUTHORITY OF AGENT—ESTOPPEL.

The subordinate lodge of a benefit association, authorized to receive or collect dues and transmit them to the association, is the agent of the association for that purpose, whose acts within the scope of its

* Decision rendered, Dec. 17, 1913. 103 N. E. Rep. 584.

agency are binding, and the association cannot deny its agency within the scope of such authority.

(For other cases, see Insurance, Cent. Dig. § 1838; Dec. Dig. § 697.)

7. INSURANCE—ACTION ON CERTIFICATE—PRESUMPTION.

It must be presumed that a beneficiary association knew of the practice of its local camp in receiving and remitting assessments after the day on which they were payable.

(For other cases, see Insurance, Cent. Dig. §§ 1999-2002; Dec. Dig. § 817.)

8. INSURANCE—FORFEITURE FOR NONPAYMENT—WAIVER.

The by-laws of a mutual benefit association required members to pay assessments to the local camp which was its authorized agent in receiving the payment of dues, and with which alone a member dealt, and the recorder of such camp, with full knowledge of a cause of suspension and the state of the member's health, accepted his assessments remitted to the association, and treated the insurance as in force. *Held*, that such acceptance of the assessment was a waiver of the cause of suspension.

(For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.)

Appeal from Appellate Court, First District, on Error to Municipal Court of Chicago; McKenzie Cleland, Judge.

Action by T. M. Dromgold against the Royal Neighbors of America. Judgment for plaintiff was reversed by the Appellate Court (177 Ill. App. 1), and plaintiff appeals on a certificate of importance. Reversed, and judgment of municipal court affirmed.

Thomas G. Vent, of Chicago, for Appellant.

U. A. Screechfield, E. A. Enright of Kansas City, Kan., and A. W. Fulton, of Chicago, for Appellee.

CARTER, J.

This was a suit brought by appellant in the municipal court of Chicago to recover from appellee, a fraternal beneficiary society, \$1,000 on a certificate issued to his wife. The trial before the court resulted in a judgment for \$1,000 in favor of appellant. On a writ of error the Appellate Court reversed the judgment, without remanding the cause and granted a certificate of importance. This appeal followed.

December 21, 1896, Ella Bell Dromgold, the wife of appellant, became a charter member of Crystal Camp No. 468 of the Royal Neighbors, at Seneca, Ill., and a beneficiary certificate for \$1,000 was issued, payable at her death to her husband. She died March 13, 1909. All assessments had been paid as they became due except one of \$1.20 due on January 31, 1909, which was paid on February 4th of that year to Mrs. Marie Wilcox, recorder of the local camp, and forwarded to the supreme recorder between the 5th and 10th of that month, in accordance with her custom. Mrs. Dromgold had been ill for several months before her death with diabetes, and her health was impaired from that cause on February 4th. Appellant testified that in November, 1908, he told Mrs. Wilcox that his wife was sick and he might neglect to pay the dues, and asked her to see that they were paid, promising to repay her. This, he testified, she agreed to do. While not remem-

bering her reply to his request, she remembered that he made one and did not contradict him on this point.

[1] The Appellate Court states in its opinion that the facts are undisputed. That court made no finding of fact, and must therefore be taken to have found the facts the same as the trial court and to have reversed the judgment for an error of law.

The principal question urged is whether the suspension because of the nonpayment of the January assessment on time was waived by the subsequent acceptance of the assessment by the recorder of the subordinate lodge with knowledge that Mrs. Dromgold's health was impaired. This question was properly presented by propositions of law in the trial court.

Mrs. Dromgold in her application agreed to pay all dues and assessments promptly and to conform in all respects to the rules and by-laws of the association. The following by-laws contain the provisions to which our attention has been particularly called:

"Sec. 45. No waiver of any by-laws—No officer of this society, nor any local camp officer, is authorized or permitted to waive any of the provisions of the laws of this society which relate to the contract for the payment of benefits between the member and the society, whether the same be now in force or hereafter enacted."

"Sec. 63. Members, when liable to suspension—if the member fail or neglect to pay an assessment to the local recorder within the limit of time provided for in these laws the member shall stand suspended. During such suspension the benefit certificate of such member shall be void. The supreme recorder shall address to all suspended members a notice of such suspension, together with a statement of the requirements for reinstatement: Provided, that the giving of such notice of such suspension shall not be deemed to be a prerequisite of suspension, and shall not have the effect of waiving suspension or leaving the society liable to such suspended member or his beneficiary or beneficiaries."

"Sec. 65. How to reinstate beneficial members—if arrearages of every kind are paid up within sixty days after suspension, together with current assessment and one advance assessment, and the member's health is not impaired, the member shall thereby be restored to membership and his or her benefit certificate made binding as soon as such payment is received and recorded by the local camp recorder."

"Sec. 279. Recorder declared to be agent of camp—The recorder of a local camp is hereby made and declared to be the agent of such camp and not the agent of the supreme camp, and no act or mission on her part shall have the effect of creating a liability on the part of the society or of waiving any right or immunity belonging to it."

Section 75 also contains a provision that "any member failing to make payment of an assessment on or before the last day of each month shall by reason of such failure stand suspended."

Counsel for the appellee contended that, under these provisions of the by-laws, Mrs. Dromgold forfeited her membership by failing to pay her assessment in January, and that, she being in impaired health, the receipt of the assessment thereafter, on February 4th, by the local recorder at Seneca did not waive this forfeiture.

[2] The application for a benefit certificate and the by-laws of the society are to be considered a part of the contract between the society and the member. *Enright vs. Knights & Ladies of Security*, 253 Ill. 460, 97 N. E. 681.

[3] Restrictions upon the power of an agent of an insurance company to waive any of the conditions of the contract or upon the manner of such waiver are themselves conditions of the contract, which may be waived the same as any other condition of the policy. *Phenix Ins. Co. vs. Grove*, 215 Ill. 299, 74 N. E. 141, 25 L. R. A. (N. S.) 1; *Orient Ins. Co. vs. McKnight*, 197 Ill. 190, 64 N. E. 339; *Bennett vs. Union Central Life Ins. Co.*, 203 Ill. 439, 67 N. E. 971. It has been held by this court that the doctrine of waiver applies not only to insurance companies having a capital stock, insuring for pecuniary profit, but also to mutual benefit associations. *Metropolitan Accident Ass'n vs. Windover*, 137 Ill. 417, 27 N. E. 538; *Railway Conductors' Benefit Ass'n vs. Tucker*, 157 Ill. 194, 42 N. E. 398, 44 N. E. 286; *Coverdale vs. Royal Arcanum*, 193 Ill. 91, 61 N. E. 915; *Illinois Life Ass'n vs. Wells*, 200 Ill. 445, 65 N. E. 1072. The nature and objects, as well as the organization and government of such associations, render the application of general rules of law in most cases the same in mutual benefit associations not organized for pecuniary profit as in insurance societies organized for pecuniary profit. 3 Am. & Eng. Ency. of Law (2d Ed.) 1044; see, also, *Niblack on Benefit Societies and Accident Ins.* (2d Ed.) § 3; 1 Bacon on Benefit Societies and Life Ins. (3d Ed.) § 23.

[4] No absolute rule can be laid down as to what acts will in all cases amount to a waiver of a forfeiture of membership in a mutual benefit society, but this court held in *Railway Conductors' Benefit Ass'n vs. Tucker*, supra, on page 201, of 157 Ill., on page 400 of 42 N. E., that "conduct on the part of the society, which amounts to a recognition of a member's claim to the continuing rights of membership, will relieve him from the consequences of his default. The receipt of assessments after default in payment is a common form of waiver." An acceptance of an assessment without condition waives all the former known grounds of forfeiture. *Rice vs. Society*, 146 Mass. 248, 15 N. E. 624; *Niblack on Benefit Societies & Accident Ins.* (2d Ed.) § 304.

[5] Notwithstanding the declarations of by-laws of mutual benefit societies to the contrary, under the decisions in this state the subordinate lodge or council is the agent of the supreme lodge or council. *Independent Order of Foresters vs. Schweitzer*, 171

Ill. 325, 49 N. E. 506; Royal Neighbors of America vs. Boman, 177 Ill. 27, 52 N. E. 264, 69 Am. St. Rep. 201; Grand Lodge A. O. U. W. vs. Lachmann, 199 Ill. 140, 64 N. E. 1022; Court of Honor vs. Dinger, 221 Ill. 176, 77 N. E. 557; Jones vs. Knights of Honor, 236 Ill. 113, 86 N. E. 191, 127 Am. St. Rep. 277; Johnson vs. Royal Neighbors of America, 253 Ill. 570, 97 N. E. 1084.

[6-8] This is practically conceded by appellee, but it is insisted that it has never been held by this court that the agency of the subordinate lodge cannot be limited by the by-laws of the association. This court has recently had occasion to consider this question in *Love vs. Modern Woodmen*, 259 Ill. 102, 102 N. E. 183, and there stated that, while the local camp was the agent of the head camp as to some things, it was not a general agent authorized to do everything that the head camp or its officers could do, but further stated at page 106 of 259 Ill., at page 184 of 102 N. E.: "The subordinate lodge of a benefit association, authorized to receive or collect dues and transmit them to the association, is the agent of the association for that purpose, and its acts within the scope of the agency are binding on the association. So, if a subordinate lodge, with full knowledge of a fact which would render a certificate void, continues to receive dues from a member, the right to forfeit the certificate on account of that fact is waived. A subordinate lodge receiving dues and paying them over to the principal lodge necessarily treats the insurance as in force."

The by-laws of this organization require the members to make their payments to the local camp. They cannot remit directly to the supreme recorder. The officers of the supreme lodge may have had no actual knowledge of what the local recorder had done, but these local lodges are the agents of the order, clothed with authority to act for it in receiving the payment of dues, and with them, alone, the member must deal. If the order permits the subordinate lodge and its officers to act in such a manner that the holder of a certificate is justified in believing that the reasons for forfeiture specified in the by-laws have been waived, it cannot set up a forfeiture incurred by relying upon such action as a defense against the certificate. While the by-laws of the appellee declared a forfeiture for the nonpayment of an assessment during the calendar month, the evidence shows, without contradiction, that it was the custom for the recorder to remit from the 5th to the 10th of the following month and to accept payment of assessments up to the time of remitting, and to report for suspension any one who paid after the 1st of the month but before the time of so remitting. This was a regular course of conduct of the present recorder and of her predecessors for years previous. It must be presumed that appellee knew of this practice. The supreme lodge, intrusting its local recorder with authority to receive assessments, stands in no position to deny that she was its agent within the scope of that authority. *Knights of Pythias vs. Withers*, 177 U. S. 260, 20

Sup. Ct. 611, 44 L. Ed. 762. The subordinate lodge, with full knowledge of the supposed cause of suspension and the state of Mrs. Dromgold's health, accepted the assessment and treated the insurance as in force. Appellee cannot now insist that she was suspended. The municipal court did not err in refusing to hold the proposition of law to the contrary.

Nothing is said in *Court of Honor vs. Dinger*, *supra*, *Johnson vs. Royal Neighbors*, *supra*, and other decisions in this state relied on by counsel for the appellee, that is out of harmony with the conclusions reached here. In *Court of Honor vs. Dinger*, *supra*, the question, among others, was involved as to whether or not the insured, when reinstated, was in good health. There was no claim that the officials of the local camp of the Court of Honor knew the insured was in poor health. Had there been any evidence in this record indicating that the local camp had been deceived as to the condition of the health of Mrs. Dromgold, certain rules of law laid down in that case might have been invoked here, but on the facts in this record they are not applicable. The contentions of counsel for appellee on this point, if carried to their logical conclusion, would result in overruling the decisions of this court as to the local lodge or camp being the agent of the supreme lodge or camp. The judgment of the Appellate Court will be reversed and the judgment of the municipal court affirmed.

Judgment of the Appellate Court reversed and judgment of municipal court affirmed.



SPRINGFIELD COURT OF APPEALS.

MISSOURI.

GILLEN

vs.

NEW YORK LIFE INS. CO.*

I. INSURANCE — LIFE POLICY — CONSTRUCTION — LOAN ON POLICY.

Under Rev. St. 1899, § 7897; providing that no life insurance policy shall, after payment of three annual premiums, be forfeited for default in payment of premiums, but that three-fourths the net reserve value of the policy, after deducting any indebtedness for past-due premiums, shall be used for the purchase of temporary or extended insurance, a loan contract, entered into between the company and the insured subsequent to the issuance of the policy, by which the insured pledged his policy as security, and agreed in advance that, in case of default in

* Decision rendered, Dec. 11, 1913. 161 S. W. Rep. 667.

payment of premiums or interest, the company could apply the net reserve value to the payment of the loan, was void in so far as it attempted to contract in advance that the net value should be applied other than for the purchase of extended insurance, since the statute enters into and forms a part of every policy and takes precedence over anything contained therein or in any subsequent or collateral contract.

(For other cases, see Insurance, Cent. Dig. §§ 1307, 1308; Dec. Dig. § 523.)

2. INSURANCE—SURRENDER OF POLICY—ACTS CONSTITUTING.

A pledge by the insured of his life policy to the company to secure a loan, the contract providing that, in case of default in payment of premium or interest, the company could foreclose the pledge and satisfy the loan out of the net value of the policy, was not a surrender of the policy under Rev. St. 1899, § 7900, providing that the insured may at any time surrender his policy for a consideration adequate to himself.

(For other cases, see Insurance, Cent. Dig. §§ 519, 522; Dec. Dig. § 240.)

3. INSURANCE—LOAN CONTRACT—PLEDGE—PERSONAL LIABILITY.

An insured, in accordance with the terms of a life policy, contracted with the company for a loan and pledged his policy as security, the contract containing an express promise by the insured to repay and redeem. *Held*, the contract created a personal obligation on the insured, and, though the pledge was void, the personal obligation remained.

(For other cases, see Insurance, Dec. Dig. § 179½.)

4. INSURANCE—RIGHT TO SURRENDER LIFE POLICY—STATUTES.

Though a loan contract by which the insured pledged his policy to the company as security and agreed in advance that, in case of default in payment of either premiums or interest on the loan, the company could foreclose the pledge and satisfy the loan out of the net value of the policy, was void under Rev. St. 1899, § 7807, providing that no life policy shall be forfeited for default in payment of premiums, but that the net reserve shall be used in the purchase of temporary insurance, yet, under Rev. St. 1899, § 7900, providing that the insured may, at any time, surrender the policy to the company for a consideration deemed adequate to himself, the insured could, after default in payment of the premiums, surrender the policy in consideration of the company canceling the personal indebtedness incurred by the loan.

(For other cases, see Insurance, Cent. Dig. § 18; Dec. Dig. § 239.)

5. INSURANCE—SURRENDER OF LIFE POLICY.

The insured could consent to a surrender of the policy and the application of its proceeds to the payment of his loan either directly or by way of estoppel.

(For other cases, see Insurance, Cent. Dig. § 518; Dec. Dig. § 239.)

6. INSURANCE—ACTS CONSTITUTING—SURRENDER OF LIFE POLICY—ESTOPPEL.

Where the insured was not sufficiently informed of his rights, his failure to reply to a notice from the company and protest against the application of the proceeds of the net reserve of his policy to the

satisfaction of a personal indebtedness created by a loan was not an acquiescence by estoppel to such action by the company.

(For other cases, see Insurance, Cent. Dig. §§ 1307, 1308; Dec. Dig. § 523.)

7. ESTOPPEL—PLEADING—SUFFICIENCY.

A plea of estoppel to be sufficient must plead the facts and elements of an estoppel, one of which is that the party invoking the estoppel was in some manner prejudiced thereby.

(For other cases, see Estoppel, Cent. Dig. § 302; Dec. Dig. § 112.)

Appeal from Circuit Court, Phelps County; L. B. Woodside, Judge. Action by Mary C. Gillen against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Jones, Hocker, Hawes & Angert and J. Loinberger Davis, all of St. Louis, for Appellant.

James J. O'Donohoe, of St. Louis, for Respondent.

STURGIS, J.

The defendant appeals from a judgment recovered in the trial court on a policy of insurance issued by defendant on the life of Frank E. Gillen in favor of his wife, Mary C., the plaintiff herein, as beneficiary. The case was tried on an agreed statement of facts. The policy was issued in August, 1900, for \$2,000, and is conditioned on the payment of semiannual premiums of \$44.50 each, payable on the 28th days of February and August of each year. These premiums were paid until August 29, 1909, when default was made. In the meantime two loans were made to the assured under the terms provided in the policy; but, as the first loan was paid out of the proceeds of the second loan, we are concerned with that one only. This loan was for \$500, at 5 per cent interest, payable in advance, and was made on April 29, 1909, and the interest then paid in advance to August 28, 1909; so that both the premium and interest on the loan became due on that date and default was made in both. No further premium was paid on the policy nor interest on the loan prior to the death of the assured on May 28, 1911.

The plaintiff's case proceeds on the theory that this policy, being a Missouri contract and governed by the provisions of the non-forfeiture laws of this state in force at the time the policy was issued, being sections 7897, 7898, 7899, and 7900, R. S. 1899, and which are the same as sections 6946, before the amendment in 1903 (Laws 1903, p. 208), 6947, 6948, and 6949, R. S. 1909, was not forfeited by default in the payment of premiums, but was kept in force until after the death of the insured by automatically applying the net value of the policy available to purchase temporary insurance as a net single premium to that purpose. The defendant claims that such net value of the policy was with the implied consent of the insured used by it in discharging the loan of the insured, valid at least as a personal obligation, thereby surrendering the policy,

and that nothing was left with which to purchase temporary insurance. It is conceded by both parties that this case is very similar to that of Christensen vs. Insurance Co., 160 Mo. App. 486, 141 S. W. 6, recently decided by the St. Louis Court of Appeals after an opinion, though without authority, had been rendered by this court, reported in 152 Mo. App. 551, 134 S. W. 100. As this is the same defendant, and the policy, loan agreement, etc., are similar in both cases, and the company used the net value of the policy at the time of default, in that case as in this one, to pay off the loan if the assured instead of applying the same to purchase temporary insurance, a reading of that case will assist in understanding both the law and facts of this one and make a more detailed statement unnecessary.

The policy itself provides that cash loans at 5 per cent interest can be obtained by the insured on the sole security of the policy after the policy has been in force for two years or more, if the premiums are paid to the anniversary of the insurance next after the date of the loan, in varying amounts as shown by a table of cash loans based on the age of the policy. This is one of the rights of the assured under the policy. The loan agreement signed by the assured and this plaintiff acknowledges the receipt of the money, \$500, agrees to pay interest on same in advance, pledges the policy as sole security for the loan and interest, and deposits same with the company for that purpose, and agrees to pay the loan when due, with the right to reclaim the policy at any time on repayment of the loan. It further provides that the loan shall become due and payable on maturity of the policy or on default in payment of any of the premiums on the policy or the interest on the loan, in which event the pledge shall be foreclosed without demand or notice by satisfying the loan out of the net value of the policy in the manner provided therein. The provision thus referred to in the policy is to the effect that if any premium or interest is not duly paid, and if there is an indebtedness to the company, then paid-up insurance will be issued on demand within six months to such amount as any excess of the reserve over such indebtedness will purchase, and, "if no such request for paid-up insurance is made, the net amount that would have been payable as a death claim on the date to which premiums were duly paid will automatically continue as term insurance from such date, for such time as said excess of the reserve will purchase according to the company's present published table of single premiums for term insurance, and no longer."

The agreed statement of facts further recites: "In accordance with said loan agreement and policy, the defendant duly foreclosed the lien on said policy on the 26th day of November, 1909, and neither the reserve held by the company on said policy on said date or at the time of its lapse, nor the reserve or net value of the policy on said date, computed upon the Actuary's or Combined

Experience Table of Mortality, with interest at 4 per cent per annum, nor the reserve or net value of the policy computed upon the American Experience Table of Mortality, with 3 per cent interest per annum, exceeded the sum then due on account of said indebtedness, and interest. Defendant, at the same time, canceled said loan and canceled the indebtedness of the insured and of plaintiff. Thereafter, on November 26, 1909, the defendant wrote and mailed the following notice: 'New York, November 26/09. Mr. Frank E. Gillen, 3540a McKean Ave., St. Louis, Mo.—Dear Sir: Re policy No. 307116. By a loan agreement executed on the 29th day of April, 1909, the above policy on the life of Frank E. Gillen was pledged to and deposited with the New York Life Insurance Company as collateral security for a cash loan of \$500.00. The premium and interest due on said policy on the 28th day of August, 1909, not having been paid, the principal of said loan became due and has been settled according to the terms of the policy, and the policy has no further value. Yours truly, John C. McCall, Second Vice President, by E. L. H.' Said notice was received by the insured and his beneficiary on or about December 1, 1909, and thereafter no steps were taken by either the insured, the plaintiff, or the defendant until this action was begun. If the loan had not been made, and if the loan agreement had not been executed, and if the foreclosure had not been made and the notice thereof given and received, said policy would have had sufficient net value to have purchased extended insurance for the full amount of the policy, to wit, \$2,000, for a period beyond the date when the insured died."

[1, 2] It will thus be seen that the whole case turns on the right of the defendant to use the net reserve value of the policy at the time default was made in the payment of premiums or thereafter in paying the loan, instead of applying it as a net single premium to purchase temporary insurance for the full amount of the policy as provided by section 7897, R. S. 1899.

The question here presented is by no means a new one and has been before the courts under somewhat varying facts in several recent cases. Christensen vs. Insurance Co., 160 Mo. App. 486, 141 S. W. 6; Christensen vs. Insurance Co., 152 Mo. App. 551, 134 S. W. 100; Burridge vs. Insurance Co., 211 Mo. 158, 109 S. W. 560; Smith vs. Insurance Co., 173 Mo. 329, 72 S. W. 935; Paschedag vs. Insurance Co., 155 Mo. App. 185, 134 S. W. 102. Most of the collateral questions presented here have been settled beyond further controversy by the cases above cited, and learned counsel have so conceded in their briefs and arguments in this court. It is no longer a question that the provisions of the non-forfeiture statutes enter into and form a part of every policy of insurance issued in this state by foreign as well as domestic companies when authorized to carry on their business here. These statutory provisions become the supreme law of every policy

"anything in the policy to the contrary notwithstanding." In the interpretation and construction of the policy contract, they dominate and override all conflicting provisions. As to the matters mentioned therein, these statutory provisions deprive the parties of freedom to contract. The object of these nonforfeiture statutes is to provide against forfeiture of policies for nonpayment of premiums by specifying that the net value of the policy shall be used in purchasing temporary insurance unless paid-up insurance is demanded within sixty days. These provisions cannot be contracted away except in the instance and in the manner provided by section 7900, R. S. 1899. *Smith vs. Insurance Co.*, 173 Mo. 329, 340, 72 S. W. 935; *Cravens vs. Insurance Co.*, 148 Mo., 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628; *Burridge vs. Insurance Co.*, 211 Mo. 158, 172, 109 S. W. 560. In *Christensen vs. Insurance Co.*, 160 Mo. App. 486, 493, 141 S. W. 6, 8, the court said: "Our Supreme Court has twice ruled that no portion of the three-fourths of the net value of the policy may be appropriated to any purpose other than the payment for temporary or extended insurance or the liquidation of notes for past premiums, as the statute stood at the time the policy here in suit was issued. See *Smith vs. Mutual Ben. Life Ins. Co.*, 173 Mo. 329, 72 S. W. 935; *Burridge vs. New York Life Ins. Co.*, 211 Mo. 158, 109 S. W. 560. The theory of those cases goes to the effect that the nonforfeiture statute in force at the time the policy is issued enters into it as a parcel of the contract and operates to prohibit any subsequent change or modification thereof between the parties thereto affecting the application of the net value."

It is also settled that what cannot be done by the original policy contract—"a straight line"—cannot be done by a supplemental or collateral contract, in this case a loan agreement; that is, "cannot be done in a circle." *Burridge vs. Insurance Co.*, 211 Mo. 158, 178, 109 S. W. 560; *Head vs. Insurance Co.*, 241 Mo. 403, 408, 147 S. W. 827.

It is also the settled law that, in determining the amount of the net value of the policy applicable to purchasing temporary or extended insurance, the insurance company has no right to demand, nor can it compel, a deduction of any indebtedness of the insured to the company except "notes given on account of past premium payments on said policy." *Smith vs. Insurance Co.*, 173 Mo. 329, 341, 72 S. W. 935; *Burridge vs. Insurance Co.*, 211 Mo. 158, 171, 109 S. W. 560; *Paschedag vs. Insurance Co.*, 155 Mo. App. 185, 198, 134 S. W. 102. It must therefore be held that the defendant in this case acquired and had no right or authority either by the original policy or by the supplemental loan agreement, or both combined, to use the net value of the policy in paying off or canceling the loan made by it to the assured. Whether the assured could or did confer this right by consent and agreement after default was made in paying the premiums will be considered later.

The pledging of the policy as security for the loan and the foreclosure of the lien on the same and the application of the proceeds to a payment of the loan, in so far as such acts depend for their validity on any power or authority given by the policy and loan agreement, were a mere nullity. These matters and things did not have for their object and purpose and did not result in "a surrender of the policy to the company for a consideration adequate in the judgment of the legal holder thereof," which is a statutory exception to the application of the preceding nonforfeiture sections of the statute in question. Section 7900, R. S. 1899.

It is also conceded, and need only be mentioned, that the amendment of section 7897, R. S. 1899, by Acts of 1903, p. 208, permitting any indebtedness of the insured to the company to be deducted from the net value of the policy before applying the same to the purchase of temporary or extended insurance, is not applicable to this policy as it was issued before such amendment, though the loan was made after the amendment. That act is not retroactive. *Paschedag vs. Insurance Co.*, 155 Mo. App. 185, 199, 134 S. W. 102; *Christensen vs. Insurance Co.*, 152 Mo. App. 551, 556, 134 S. W. 100; *Christensen vs. Insurance Co.*, 160 Mo. App. 495, 141 S. W. 6; *Burridge vs. Insurance Co.*, 211 Mo. 158, 173, 109 S. W. 560.

[3] It is also suggested that the policy and loan agreement in question makes the loan payable solely out of the policy or its proceeds, pledged for its payment as collateral security, and imposes no personal liability on the insured. It is hence argued that, as there was no indebtedness of the assured to the defendant, none could by contract or consent be deducted from the net value of the policy before applying it to the purchase of temporary or extended insurance. We do not so read or interpret the policy and loan contract. The fact that the company mainly relied on the security to collect its money does not relieve the personal liability, as such is often the case in making loans with security. The transaction is denominated a loan throughout and bears interest. There is an express promise "to pay said company said sum when due with interest," and the privilege is given to pay the amount and interest at any time and reclaim the policy. The loan is specified to become due and payable "if any premium on said policy or any interest on said loan is not paid on the date when due," and such date is clearly fixed by the policy. In *Christensen vs. Insurance Co.*, 160 Mo. App. 486, 496, 141 S. W. 6, 9, the court, in speaking of a similar loan agreement, said: "The fact that the attempted pledge of a portion of the net reserve available to the purchase of extended insurance was invalid is, of course, without influence as to the indebtedness itself. On December 18, 1905, the insured defaulted in the payment of his premium due on that date and defaulted as well with respect to the payment of interest on

his loan. Because of such defaults, the loan became due, for such was the agreement between the parties, and in this respect the agreement was certainly valid, though it contemplated as well a pledge of a portion of the net reserve not authorized by the statute."

In *Paschedag vs. Insurance Co.*, 155 Mo. App. 185, 197, 134 S. W. 102, the court, speaking of such an agreement, said: "It is true enough the loan contract does not expressly provide for a repayment of the loan except in so far as it authorizes defendant to appropriate the cash surrender value of the policy to that purpose, but it nevertheless implies an agreement to that effect, for it recites the matter as a loan to bear interest until a definite time and pledges the policies as collateral security therefor. Both parties understood at the time that they were making a loan, and nothing appears whereby the intention is manifested to terminate the relation of insurer and insured by defendant paying to the insured the cash surrender value of the policies for their surrender and cancellation."

In *Smith vs. Insurance Co.*, 173 Mo. 329, 340, 72 S. W. 935, 938, after holding that the pledge of the net value of a policy to the payment of a similar loan was invalid, the court said: "Of course, if the assured should live beyond the period of the temporary insurance, the policy would become extinct and the defendant would have only the personal liability of the estate of the assured to depend on."

In *Bank vs. Insurance Co.* (C. C.) 81 Fed. 935, the court said: "While it may be that in the settlement of an annual premium the portion thereof represented by the certificate of loan does not actually pass back and forth between the insured and the company, yet the transaction in substance is a loan of money. The certificate designates it a 'loan,' the amount bears 'interest,' and it is made a lien on the policy until 'paid.' No doubt the company's main reliance is upon this lien because of its effectiveness, but personal liability is not expressly or necessarily excluded. A loan imports an obligation to pay back. I do not see why an action could not be maintained on the certificate of loan after demand. Debt lies whenever a sum certain is due, without regard to the way in which the obligation was incurred or by what is evidenced. *Stockell vs. U. S.*, 13 Wall. 531 [20 L. Ed. 491]."

We think, therefore, that the loan transaction and agreement had between the insured and the defendant created a personal obligation on the insured to pay the amount of the loan with interest and, as the pledge of the policy was invalid in so far as it authorized, or rather attempted to empower defendant to compel, the use of the net value of the policy in discharging the loan, such loan was, so far as this case is concerned, nothing but a personal obligation of the insured and plaintiff to the defendant.

[4] For the purpose of this case then, after the assured had defaulted in the payments of his premiums, the situation was this: He had to his credit with the defendant the net value of his policy, computed as specified by section 7897, R. S. 1909, which he had an undoubted right to have used to purchase temporary or extended insurance, and, unless he consented to use it in some different way permitted by the exceptions to the nonforfeiture statutes, the law itself would apply it to that purpose. On the other hand, he was indebted to the defendant as a personal obligation only in a sum equal to or greater than this net value. In this situation, could he contract to surrender his policy and terminate his relations with defendant? We think, as held in *Christensen vs. Insurance Co.*, 160 Mo. App. 486, 141 S. W. 6, that, in view of the last clause of section 7900, R. S. 1899, he could. The reason for restricting by our nonforfeiture statutes the right to contract between the insurer and the insured is well expressed by Judge Valiant in *Smith vs. Insurance Co.*, 173 Mo. 329, 341, 72 S. W. 935, 938, as follows: "There is a great deal of technical learning in the subject of life insurance, and our lawmakers have proceeded on the theory that the average man who takes out a policy on his life is not equal in skill and learning in the technicality on that subject to the experienced officers of the insurance company, and for that reason have written into such contracts some provisions which the parties to them cannot avoid." The right and power of the insured to contract with reference to the use of the net value of his policy otherwise than in purchasing extended insurance is restricted only and not entirely prohibited. The statute itself contains exceptions, and among other things provides that the nonforfeiture provisions shall not apply "if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof." By the terms of this exception the assured may make a contract with the insurer having for its object and purpose and actually resulting in a surrender of the policy to the company and thereby terminating the relations of insurer and insured. The Legislature evidently thought the insured would be capable of making so simple a contract as surrendering his policy to the insurer for a consideration to be fixed and agreed to by himself. The insured cannot contract in advance, either in the policy or in the application for it or by any supplementary or loan agreement, that he will use the net value of his policy in case of default in payment of premiums for a purpose other than purchasing extended insurance except in the two cases provided for by the same statute where the policy contains a provision for the holder receiving unconditionally the full net value, either in cash or by new paid-up policy. Whenever the surrender of a policy is after or grows out of the default in paying the premiums, the consideration for the surrender must be fixed and

agreed to after such default. The hands of the insured must be left untied until he is ready to and does actually surrender the policy to the company.

In speaking of the exceptions to our statute now under consideration, the Supreme Court of the United States, in *Equitable Life Society vs. Clements*, 140 U. S. loc. cit. 234, 11 Sup. Ct. 825 (35 L. Ed. 497), which case has been the foundation of most of our state decisions, said: "In defining each of these two cases, the statute, while allowing the holder to make a new bargain with the company, at the time of surrendering the policy, and upon such terms as, on the facts then appearing, are satisfactory to him, yet significantly, and, it must be presumed, designedly, contains nothing having the least tendency to show an intention on the part of the Legislature that the company might require the assured to agree in advance that he would at any future time surrender the policy or lose the benefit thereof, upon any terms but those prescribed in the statute."

In *Smith vs. Insurance Co.*, 173 Mo. 329, 342, 72 S. W. 935, 939, the court said: "True the plaintiff's husband did obtain that amount of money from the company, but not after default in the payment of the premium, not after the provisions of the statute under discussion took effect, not as in payment to him of the cash surrender value of the policy; but he obtained it as a loan for which he executed his note and gave collateral security and for which his estate is liable to the defendant, and for which also the defendant holds the policy in suit as security." And in *Burridge vs. Insurance Co.*, 211 Mo. 158, 178-179, 109 S. W. 560, 566, the Supreme Court rejected the defense of the insurer because the insured was insane and could not contract, or agree as to a surrender of the policy or a consideration therefor at the time of the alleged actual surrender of the policy, though he had tried to do so by contract in advance, and because no consideration was shown to have been accepted at the time of the surrender. But the court also said: "That section plainly contemplates that the relation of insurer and insured may be brought to an end if the insurer complies with its provisions, and the policy is surrendered 'for a consideration adequate in the judgment of the holder.'"

In *Paschedag vs. Insurance Co.*, 155 Mo. App. 185, 199, 134 S. W. 102, the court gives the reasons why a loan contract providing for a surrender of a policy in case of default in paying interest and premiums does not fall within the exceptions to the statute providing for a surrender of the policy "for a consideration adequate in the judgment of the legal holder thereof," in these words: "But, of course, this involves, too, a transaction where the parties contemplate a cessation of the insurance contract at the time. By the express provision of the statute, the insured may surrender the policy and terminate the relation of

insurer and insured for any consideration which in his judgment is adequate therefor; but the consideration must be given by the company for such a surrender and not for some other purpose. * * * Where the transaction is denominated by the parties as a loan and the pledge of the policies, and their dealings touching the matter manifest they did not intend the policy was thereby surrendered in the sense of the statute referred to for a consideration adequate in the judgment of the insured, the court is not justified in saying the transaction was a surrender. For a case directly in point, see *Raymond vs. Insurance Co.*, 86 Mo. App. 391."

We therefore hold that, while the plaintiff did not and could not by the policy or loan agreement make a valid contract compelling him to surrender his policy in case of default in payment of premiums and interest and apply the net value of the policy or any part thereof in payment of such loan, yet he could after such default voluntarily agree to and actually surrender his policy to the company in consideration of the payment of his personal debt to the company out of the net value of his policy.

[5, 6] Viewing this case as we must from the standpoint that the assured's pledge of his policy to the payment of his loan was void, that such loan was a personal debt only, that after his default in payment of the premium and interest he was perfectly free to refuse or give assent to the use of the net value of the policy to the payment of his indebtedness to the company instead of applying it to the purchase of temporary insurance—a proposition, which, if accepted, would result in a surrender of his policy for a consideration adequate in his judgment—the sole question remaining is to determine whether he did assent to this settlement and surrendered his policy. We will concede that he might assent to this arrangement either directly or by way of estoppel. It must be granted, however, that the defendant had no right to impose on the insured any such settlement, and it will be seen that when it wrote to him in effect that it had foreclosed the loan and applied the net value of the policy to the payment of the loan, thus canceling both the policy and his personal indebtedness to it, the letter in no wise suggested that he had any right to object and decline any such settlement. This letter was not designed to give the insured any freedom to contract with reference to this matter. It gave no figures or amounts and no information as to the method of computation used or how it arrived at the result that the policy is of no value. It is based on the assumption by the defendant that the loan agreement and pledge of the policy gave the defendant company the absolute right to apply the net value of the policy in payment of the loan and that it had exercised this right, and therefore the "policy has no further value." The letter does not call for any choice or answer, and the only thing suggested that the in-

sured could do is to have protested against this arbitrary action of the company. The contention of the defendant is that the failure of the insured to so protest works an estoppel by acquiescence equivalent to a voluntary agreement that the policy be surrendered in consideration of the cancellation of the loan indebtedness. It must, however, be borne in mind that the insured was under no obligation to make any choice or request in order to obtain the extended insurance. The law gave him this benefit unless he voluntarily chose and assented to the other alternative of at that time surrendering the policy for a consideration adequate in his judgment.

[7] In thus charging against the insured a duty to protest against the company's action in this respect, defendant imputes to him and the beneficiary a better knowledge of their rights under the policy than was possessed by the company. We will accord to the company an honesty of purpose and that it honestly believed the loan agreement and pledge of the policy gave it a right to thus cancel the policy, although, as we have seen, it was mistaken in this. As said in *Smith vs. Insurance Co.*, supra, the insured is not presumed to have the technical knowledge in reference to life insurance contracts possessed by the experienced officers of such companies; and, if they did not know the rights of the respective parties under this policy contract, how can the insured be charged with sufficient knowledge of his rights thereunder on which to base a protest? Logic and common sense demand that before there is a duty to protest against any action of another the party protesting must have sufficient knowledge of his rights to justify such protest and which suggests to him his duty to make protest. "Waiver is always a question of intention and rests upon a full knowledge of all the material facts upon the part of the person against whom the defense is interposed. In the case at bar there is no evidence that the present beneficiary had any knowledge or information whatever of her rights under the contract in suit as fixed by the statutes and laws of Missouri, and hence there is no evidence that she should have intended to abandon the enforcement of such rights." *Head vs. Insurance Co.*, 241 Mo. 403, 419, 147 S.W. 832; *Burke vs. Adams*, 80 Mo. 504, 514, 50 Am. Rep. 510; *Tennent vs. Insurance Co.*, 133 Mo. App. 345, 362, 112 S.W. 754. Nor were there any sufficient facts pleaded to constitute an estoppel. A plea of estoppel to be sufficient must plead the facts and elements of an estoppel, one of which is that the party invoking the estoppel was in some manner prejudiced thereby—that he was induced to do or refrain from doing something to his injury. Whatever may be the facts, the defendant did not plead that it refrained from collecting the personal obligation arising from the loan agreement because of its reliance on such debt being fully paid by the application of the net value of the

policy to such purpose. *Miller vs. Anderson*, 19 Mo. App. 71, and cases cited; *Osburn vs. Court of Honor*, 152 Mo. App. 652, 661, 133 S. W. 87; *Northrup vs. Coulter*, 150 Mo. App. 639, 649, 131 S. W. 364.

In the Head Case, *supra*, as in this one, the insurance company undertook to enforce its supposed right under a similar loan agreement to apply the net value of the policy at the time of default in payment of premiums to the payment of the loan and gave the insured and beneficiary written notice of its action to that effect. The facts there show that the insured and beneficiary received and retained this notice without any response or objection for nearly a year and until the insured's death. Then, for the first time, the alleged settlement was repudiated by bringing suit on the policy on the theory that the policy was kept in force by applying the net value to the purchase of temporary insurance alone. There was a small net-value surplus left after paying the amount of the loan, which was applied to purchase a paid-up policy amounting to \$89, and an indorsement to this effect was made on the policy and same returned to and retained by the insured along with the statement as to the use of the greater portion of the net value in paying the loan. The insurance company offered to pay and tendered the amount due as a paid-up policy. Responding to the question of waiver or estoppel under these facts, the court, in addition to what is above quoted, held: "Neither can it be urged that the \$89 tendered to plaintiff before and by this suit as the full amount of a paid-up policy under the New York law, and the fact that the policy was returned to her with that indorsement and retained for some months until after the death of her father, be held to operate as a waiver of any rights to which she was otherwise entitled."

On the point now being discussed, the Head Case, *supra*, seems to be in direct conflict with the case of *Christensen vs. Insurance Co.*, 160 Mo. App. 486, 141 S. W. 6; the facts of the two cases being so near alike as to warrant no distinction in principle. The decision in the Head Case was rendered shortly after the decision in the Christensen Case and makes no mention of it. The only difference pointed out between the present case and the Christensen Case is that in the Christensen Case the whole net value of the policy was not used in paying the loan, and therefore the policy was returned and retained by the insured in that case with an indorsement on the policy as to how the net value had been applied; while in this case, the whole of the net value being so used, there was no need to return the policy and the notice as to the company's action in the matter was given by letter. The Christensen Case, however, does not differ from the Head Case, *supra*, even in that respect. In each case, however, a written notice in some form was sent

to the insured notifying him as to what had been done in the way of applying the net value of the policy to a cancellation of the loan and the effect thereof on the policy. It is the acquiescence of the insured after full notice as to what had been done that constitutes the estoppel in either case, and it does not matter whether the notice comes from an indorsement on the policy or in a letter to the insured.

This court, of course, is bound by the Head Case, *supra*, as being the last decision of the Supreme Court. We have, however, sufficiently indicated our own views on the matter. It is conceded in this case, as in the Head and Christensen Cases, that there was no direct or express assent or agreement to a surrender of the policy for a consideration adequate in the judgment of the insured, and we hold, as did the Supreme Court, that the facts here are not sufficient to show that such result was accomplished by acquiescence amounting to an estoppel.

The judgment will therefore be affirmed.

Robertson, P. J., and Farrington, J., concur.



SUPREME COURT OF MICHIGAN.

BOWEN

vs.

PRUDENTIAL INS. CO. OF AMERICA.*

1. INSURANCE—LIFE POLICY—APPLICATION—EFFECT.

Where an application for a life insurance policy provided that the policy should not take effect until issued and delivered by the company, and the first premium paid in full, while insured was in good health, the application was binding on insured, became part of the proposed contract, and fixed the time when the policy should become operative and the insurance begin.

(For other cases, see Insurance, Cent. Dig. §§ 362-371; Dec. Dig. § 175.)

2. INSURANCE—COMMENCEMENT OF CONTRACT—POLICY—ACTUAL DELIVERY—NECESSITY.

While it is generally held, in the absence of an agreement to the contrary, that actual delivery is not a prerequisite to the taking effect of a policy or contract of insurance, provided the contract is otherwise complete, yet, if there is a provision or agreement that the policy shall not be in force until actual delivery to insured, the contract will not be consummated or the insurer bound without such delivery.

(For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.)

* Decision rendered, Dec. 20, 1913. 144 N. W. Rep. 543.

3. INSURANCE—CONTRACT—TAKING EFFECT—TIME—DELIVERY OF POLICY TO AGENT.

Decedent applied for a policy of life insurance October 27, 1910, and paid the first premium, taking a receipt, which provided that the payment should not be binding on the insurer, and would be returned if the application was declined. The application also provided that the policy should not take effect until it was delivered, and the first premium paid, while insured's health was in the condition described in the application. January 16, 1911, the policy was issued, dated January 24th, and mailed to the defendant's manager in Kansas, with instructions not to deliver the policy unless the applicant was in satisfactory health. On the same day the policy was so received insured was killed, and the state manager, without knowledge of his death, mailed the policy, with similar instructions, to the soliciting agent for delivery, but, insured being then dead, the policy was never delivered, and a tender of the premium already paid was refused. *Held*, that neither of defendant's agents so receiving the policy was the agent of insured, and that there was no delivery of the policy prior to insured's death sufficient to initiate a contract of insurance.

(For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.)

Error to Circuit Court, Montcalm County; Frank D. M. Davis Judge.

Action by Myrtle E. Bowen against the Prudential Insurance Company of America. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before Steere, C. J., and Moore, McAlvay, Brooke, Kuhn, Stone, Ostrander, and Bird, JJ.

Kleinhans, Knappen & Uhl, of Grand Rapids, for Appellant.
Walker & Fitzgerald, of Grand Rapids, for Appellee.

STEERE, J.

Plaintiff brought this action in the circuit court of Montcalm County to recover the amount of an insurance policy for \$1,000, alleged to have been issued by defendant on the life of her husband, Eugene T. Bowen, who was accidentally killed on the 28th of January, 1911. Deceased resided in Montcalm County, near Howard City, which was his postoffice address. Said policy is dated the 24th day of January, 1911, and at the time of the death of deceased was in the hands of Charles McCready, state manager for defendant, located at Wichita, Kan. Defendant was and is a foreign corporation organized under the laws of the state of New Jersey, with its home office at Newark in said state, being authorized to do business in the states of Kansas and Michigan, respectively.

The issue presented is whether or not said policy ever became operative. It is claimed by defendant that it had not yet become valid and binding because of nondelivery.

The facts in the case are practically undisputed. Eugene T. Bowen, deceased, made application on December 27, 1910, for insurance in defendant company, naming plaintiff as the beneficiary. At that time his age on his nearest birthday was 34 years; he having been born on June 29, 1876. He asked to have his

policy dated on the day he made his application. The application was solicited and taken by an acquaintance of deceased named Van Ostrand, who was a special agent of defendant, apparently with a roving commission, but working under said McCready, the Kansas state manager of Wichita. Van Ostrand's home was in Marion, Kan., and his position with defendant was superintendent of agencies under McCready. At the time of making his application Bowen paid Van Ostrand \$21.43, which was an amount equal to the first premium on the policy applied for, taking a receipt, which provided that such payment would in no manner be binding on the company, except that it would be returned in case the company declined to issue a policy on the life of the applicant. A statement of physical examination for insurance made by a local physician not authorized by defendant accompanied the application; but the defendant company required an examination made by its own medical examiner. This examination was had on January 16, 1911, and the medical examiner's report duly forwarded to the home office of defendant. After this was received and approved, the policy in question was prepared, dated January 24, 1911, and mailed on that date, with instructions attached, to said Manager McCready on Saturday, January 28th, some time during the forenoon. He also received about the same time a letter of instructions, dated January 25th relative to an apparent discrepancy between the statements of age found in the application and report of defendant's medical examiner. This we regard as unimportant, inasmuch as it appears clearly there was no discrepancy in fact; deceased's nearest birthday having changed between the time of his application and the time of his last medical examination. Attached to the policy was a red slip of instructions to agents such as the company was in the custom of sending with all its policies and receipt for the insured to sign. The latter was to be countersigned by the agent delivering the policy. The slip also gave directions not to deliver the policy unless the applicant was at the time in a satisfactory state of health. On the same day this policy was received by McCready, Saturday, January 28th. Bowen was killed, some time between 2 and 3 o'clock in the afternoon, while working in the field near his home in Montcalm County hauling stumps with a team, having apparently been struck by the root of a stump on which he was working. When last seen alive by his father shortly before the accident on the same afternoon, he was in good health, and had been so continuously from the time he made application for insurance. As far as shown his death was entirely accidental. On Monday, January 30th, McCready, having no knowledge of the applicant's death, mailed the policy, with the red slip of instructions, premium receipt, and letter of instructions relative to the discrepancy in the age to B. D. Van Ostrand, superintendent of agencies, Topeka, Kan.; that being his business address. Forwarding these papers to the agent who secured the application, for delivery to the applicant accord-

ing to inclosed instructions, was in pursuance of the usual custom of defendant. Bowen being dead when Van Ostrand received these papers, he returned the same to Manager McCready on February 3d, notifying him of the situation, at the same time remitting the amount paid him by Bowen to meet the first premium. This was sent to Bowen's family on February 24th, with a request for return of the receipt for same given by Van Ostrand to Bowen on December 27, 1910. This receipt contained the following clause: "It is understood that this payment is in no way binding upon the said company, except that said company agrees to return the amount mentioned hereon in case the company declines to grant a policy on the life of said applicant." This amount was again sent to McCready on April 11th by plaintiff's attorney, who insisted that defendant was liable upon the policy under a completed contract of insurance.

Plaintiff's declaration contains two counts; one alleging delivery of the policy on January 28th to plaintiff "or some person for and in his behalf," the second basing a claim of liability on acceptance of the application and execution of the policy.

Defendant pleaded the general issue, and gave special notice of defense, alleging agreement that there should be no contract of insurance until delivery of the policy, and that the same was never delivered to said Bowen or any one in his behalf prior to his death or at any other time; also giving notice of payment into court of the money received by Van Ostrand from applicant, a tender of which had been kept alive in the meantime.

At the close of plaintiff's evidence, and again at the close of all the testimony in the case, defendant's counsel moved for a directed verdict in his behalf on the ground of nondelivery of the policy. This was denied by the court, and verdict directed in favor of the plaintiff on the ground that there had been full performance on the part of deceased, following which the company had executed the policy, transmitted it from the home office to its agent for delivery, and therefore, deceased being in a legal position at the time of his death to have demanded and compelled delivery of said policy, the same was valid and binding.

Plaintiff's claim that approval of the application and execution of the policy by defendant created a liability in the absence of delivery cannot be sustained. In his application over his own signature, Bowen expressly agreed "that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said company, and the first premium paid thereon in full, while my health is in the same condition as described in this application."

[1] This is plain language, easily understood. The application was initiative of the proposed contract, would become a part of it when consummated, was binding on the applicant, and fixed the

- time when his policy should become operative and his insurance begin. It is presumed to have been understandingly made. *Van Buren vs. St. Joseph Co. V. F. Ins. Co.*, 28 Mich. 398; *Am. Ins. Co. vs. Stoy*, 41 Mich. 385, 1 N. W. 877.

[2] While it is generally held, in the absence of an agreement to the contrary, that actual delivery is not a prerequisite of insurance, provided the contract is otherwise complete, and it is evident that the parties intended it should be effectual without manual delivery of the policy, although the ultimate issue of one was contemplated, it is also well settled that, "if there be a provision or agreement that the policy shall not be in force until actual delivery to the insured, the contract is not consummated nor the company bound in the absence of such delivery." *Joyce on Insurance*, § 98. "A contract of insurance never becomes complete until the last act necessary to be done by either party has in fact been done, although one side or the other may conditionally bind itself by a proposition which, when unconditionally accepted, ripens the negotiations into a contract. In the case of fire insurance contracts there is often a contract before the policy is issued or before it is delivered to the insured; but this is seldom so with life insurance agreements, because there is usually, in the applications as well as the policies, a stipulation that the policy shall not be binding until delivery to the assured while in good health, and payment of the premium by him. Such conditions are valid and binding, and will be enforced." *Bacon on Insurance* (3d Ed.) § 272.

[3] A contract of insurance rests upon and is controlled by the same principles of law applicable to any other contract. What the contracting parties intended, mutually agreed to, and their minds met upon, is the measure of their obligations. They could agree that the policy, though approved and executed, should have no effect until delivered, or till a certain time had arrived, or until some other condition had been performed, and when this is established the courts have no authority to make the contract binding upon either party contrary to their intention and the terms of their express agreement.

Here it was plainly agreed in writing that the policy in question should not take effect until issued and delivered to Bowen while he was in as good health as when he applied for the insurance.

It is contended in behalf of plaintiff that under the circumstances shown there was in contemplation of law such constructive delivery of the policy as complies with the terms of the contract. This is based on approval of the application, execution of the policy, and mailing it to the general agent in Kansas for delivery. Numerous cases are cited where it has been held that, if the premium is paid or acknowledged, and the policy, signed in accordance with the application, transmitted to the applicant or the company's agent for delivery, the contract is complete, although the insured failed to receive it; the agent, in case it was sent to

him, being regarded as agent or trustee for the insured. Most of the cases so holding are readily distinguishable from the one before us in the particular that the contract of insurance is bare of any provisions that the policy shall not become operative until the same is delivered to the insured while in good health, and it was therefore forwarded for unconditional delivery; the contract being complete in all its essentials, and nothing remaining to be done but to put it into the hands of the insured. The principle deducible from those authorities is thus stated, in *May on Insurance* (4th Ed.) § 60: "To constitute a delivery of a policy, it is not necessary that there should be an actual manual transfer from one party to the other. The agreement upon all the terms, and the issue and transmission to the agent of a policy in accordance therewith, for delivery without conditions, is tantamount to a delivery to the insured."

Can it be said here that the policy was transmitted to the agent for unconditional delivery? While the word "issued" is often loosely used in relation to the execution and transmission of a document, issuing and delivering are in this connection equivalent legal terms. A policy of insurance is the formal, written instrument in which a contract of insurance is embodied, and in its nature such as to be within the general rule of law that a contract in writing cannot be varied or altered by parol testimony. When the contract provides that it shall not be operative until the instrument is delivered to the assured, delivery means, as in case of delivery of muniments of title, a surrender of possession and control, the transfer of the instrument from the grantor to the grantee, or some person in his behalf, in such a manner as to deprive the grantor of the right to recall it at his option. *Bouvier's Dictionary*. There are two essentials to such a delivery—an intention to deliver, and an act evincing a purpose to part with control of the instrument. It is difficult to gather such intention from the undisputed facts in this case. The contrary is the natural inference. The policy was not mailed to the insured, who lived in Michigan, nor to a local agent there, but to the general manager of defendant in Kansas, under whom the canvasser who secured the application worked, and who also resided in Kansas. It was sent from the head office to a subordinate office of defendant in due course of business and according to the general custom, addressed to the manager under whom the soliciting agent acted, accompanied by positive written instructions that it should not be delivered to the applicant except upon certain conditions, one of which was that he should be in as good health as when he applied for insurance. This condition the applicant knew of, and had consented to as a part of his contract. It is true that he would not be bound by any secret instructions to the agent, of which he had no knowledge, and in relation to which he had not contracted; but of this condition he did have knowledge and had so contracted.

That he knew his application was tentative, at the option of defendant, and subject to certain conditions and that in the regular course of business some time must elapse before his insurance would become effective if finally granted, is clearly indicated. Defendant had once refused to accept the application without a further medical examination, to which he had subsequently submitted, in Howard City, Mich., but twelve days before his death, and the physician's report had thereafter been forwarded to defendant's office in Newark, N. J. The instructions sent with the policy are competent and persuasive evidence of an intent tending to negative the claimed inference, from its being mailed to the Kansas manager as a step towards ultimate delivery, that it was in effect sent to the local agent for "delivery without conditions." Usage and accompanying instructions are proper to be taken into account as aids in discovering intent when considering the question of delivery.

Bowen did not receive the policy, and had no notice that his application was accepted during his lifetime. On the day of his death, and shortly before it occurred, the policy was received in Wichita, Kan., by McCready, who had nothing to do with taking the application and no previous dealings with Bowen. There were no personal relations between them in connection with placing the insurance which made McCready Bowen's agent to receive and hold the policy for him. *Busher vs. Insurance Co.*, 72 N. H. 551, 58 Atl. 41. Van Ostrand, who had conducted the negotiations, was the only representative of defendant Bowen knew or was known to. To him naturally, and according to the usual custom of defendant, would be intrusted the duty of closing the contract and delivering the policy. He did not receive it until over two days after the applicant's death, and certainly could not become the agent of one then deceased.

In the numerous cases which have been passed upon by various tribunals where it was shown insurance policies had been forwarded to local agents for delivery, the courts, in determining whether or not there was a constructive delivery and completed contract, have, as a rule, recognized and been guided by the distinction between those cases in which, pursuant to a completed contract, the policy had been forwarded for unconditional delivery and those where, by the terms of the contract, something yet remained to be done by the agent as a condition precedent to delivery.

Authorities are to be found where the claim of constructive delivery has been sustained under the particular facts shown in special cases in which the local agent, through whom the application was made, having received a policy for conditional delivery, after ample time and opportunity in which to act, neglected or failed to make delivery. The leading cases along that line, and which it is contended are controlling here, are *Life Ins. Co. vs. Babcock*, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep.

134, and Unterharnscheidt vs. Missouri State Life (Iowa) 138 N. W. 459.

In the latter case the application contained a provision that the insurance should not take effect unless the policy was delivered and accepted during the lifetime and good health of the applicant. The applicant resided in Sioux City, Iowa, and transacted the business with a resident agent of the defendant. A policy dated July 8, 1910, was mailed from the home office of the company to the local agent in Sioux City, with an accompanying letter of instructions not to deliver the same "unless settlement has been received and applicant in good health." The letter bore date July 19, 1910, and would reach him in due course of mail not later than July 20th; but the local agent left Sioux City July 15th, and did not return until August 7th following. The letter, with policy inclosed, was delivered at his office, and remained there unopened until his return. Some days after it was delivered at the agent's office the applicant sickened, and died August 2, 1910. Without attempting to review and reconcile, or fully accepting as applicable to this class of cases, all that is said in that opinion, we fully indorse the controlling, fundamental principle there declared that a party cannot take advantage of his own wrong nor profit by his own delinquencies, upon which ground the decision could well rest under the circumstances shown. It also finds support in an Iowa statute referred to. Among other things, the court said of delivery to an agent: "It is quite obvious that this may or may not be true according to the circumstances under which the policy is placed in the agent's hands. If the premium is paid when the application is presented, and such application is approved and policy executed as of that date, and nothing remains but to deliver the paper to the insured, it may well be held that the sending of it to the agent to be by him given over to such insured person constitutes a sufficient delivery in law. To say the least, the neglect or omission of the agent under such circumstances to perform the manual act of placing the policy in the hands of the insured will not serve to suspend or postpone the obligation of the company upon its contract. In other words, delivery in law is not necessarily manual delivery. * * * In other words, the applicant had complied with all the requirements of the contract on his part, and was entitled to receive the policy. He was not responsible for the voluntary absence of the agent, and his rights cannot be abridged or lost by the failure of the agent to perform his duty in the premises. * * * Our statute relating to life insurance provides that, where an applicant submits to medical examination by the company's physician, and is pronounced a fit subject of insurance, such company, in the absence of fraud, shall be estopped from pleading that the insured person 'was not in the condition of health required by the policy at the time of the issuance or delivery thereof.' Code, § 1812. No fraud is pleaded, and none is shown in testimony."

In N. Y. Life vs. Babcock, *supra*, which is quoted from extensively and followed in the Unterharnscheidt Case, Babcock made application for insurance to the legal agent at Dalton, Ga., where both resided. He paid the first year's premium, and took from the agent a receipt therefor, which provided that the company assumed no responsibility except to return the money, unless, among other things, the policy was issued and delivered to him while in good health. The application which he signed contained no such condition. In its opinion the court intimates that the condition in the receipt as to delivery while in good health was no part of the contract, but thereafter discusses certain aspects of the case as though it was. The application was approved, and a policy executed and mailed to the local agent at Dalton for delivery, without instructions and unconditionally so far as shown. It was received by the local agent about 2 p. m. November 30, 1895. Babcock's office was nearby the agent's; but no effort was made to deliver the policy to him, and it remained in the agent's possession until after Babcock's death, he having been shot and killed in his office on the afternoon of December 1, 1895. The court, after declaring the rule that "the fundamental question to be determined in legal construction of all contracts is, What was the real intention of the parties?" discussing the condition in the receipt, said: "Assuming that this condition constitutes a part of the agreement between the parties, it then becomes a material question as to whether or not such delivery was effected before the death of the insured. This is also a question of intention, and must be determined from the facts and circumstances in the case. * * * On the other hand, where a person parts with dominion and control over a thing by transmitting it, for example, through the mails or otherwise, with the intention that it shall pass unconditionally into the hands of another, and in the course of transportation it has become lost, the delivery is nevertheless complete in law." The court then, after reviewing numerous authorities and discussing them at length, apparently concludes from the facts in the case before it that the company intended to and did forward the policy to its local agent for unconditional delivery, saying: "When his application was accepted at the home office in New York, and a policy issued thereon was placed in the mails for the sole purpose of ultimately reaching his hands, the company parted with its possession and control of the paper. The intention to deliver was complete." A statutory provision of that state is also referred to as having an important bearing; the court saying: "But the contract may be otherwise proved, and, when it is shown to be in writing, it is ordinarily binding upon the company, though there should be no delivery whatever, either actual or constructive, of the policy, and though it should remain in the hands of the company. This principle is settled by the provisions of our statute, which declares: 'Such contract [fire insurance], to be binding, must be in writing; but delivery is not necessary if, in other re-

spects, the contract is consummated.' Civ. Code, § 2089. By section 2117 of the Civil Code the same principle is made applicable to life insurance." In the concluding paragraph of its opinion the court says: "In any view, then, that we take of this case, whether the receipt given by the local agent to the applicant constitutes a part of the contract of insurance or not, the defendant company was liable. The insured had complied with every condition and had done everything required of him in order to obtain insurance upon his life. The company had unconditionally accepted his application, and issued a policy to be unconditionally delivered to him. That policy was received by its local agent, who, through negligence or in disregard of his obligations both to his company and to the other contracting party, failed, without excuse and without authority, to hand the policy to its real owner. In consequence of this failure and negligence, the company contends it is not liable. It thus seeks to take advantage of the wrong of its own agent by virtually pleading his negligence as a defense to this action."

The strong, sound, underlying principle in both of the foregoing decisions, and which standing alone justifies the results reached, is that the defendants could not escape liability by relying on their own wrongs, and are estopped by their misconduct and negligence, or that of their local agents through whom the applications were made from denying a delivery which they should have made, and therefore the court could and did say that there was a constructive delivery.

The facts here differ in material particulars from those shown in the two cases just referred to, and we have no such statutory provisions in this state as gave support to those decisions. We find nothing in this case to take it out of the general rules applicable to insurance contracts as digested, from prevailing authorities cited, in 25 Cyc. pp. 718, 719. It is there said: "Likewise the placing of the completed policy in the hands of the agent for delivery without condition to the insured completes the contract, although the actual delivery by the agent to the insured is not made before the death of the insured. But, if the delivery to the agent of the company is with the understanding that it is to be delivered by the agent to the insured only after the performance of some condition, then, until the condition is performed, and it becomes the duty of the agent to deliver the policy to the insured, the contract is not completed. * * * It is a usual condition of a life insurance policy that the delivery shall not be effectual to create a binding contract unless the insured is alive and in good health when the policy is delivered and the first premium paid, and under such conditions the death of the insured before the delivery of the policy will prevent its becoming effectual. And this is true, even in the absence of such a condition, if the policy is not to take effect until delivery, for the death of the insured makes a subsequent contract with him impossible."

A leading case supporting the rule that conditional delivery to the agent is not delivery to the applicant is *McCully, Adm'r, vs. Life Ins. Co.*, 18 W. Va. 782, in which deceased applied to the local agent of his home city, Wheeling, W. Va., for a policy of \$1,000 life insurance. The application which he signed contained a provision that "this application shall be completed by delivery of the policy." A policy was sent to the local agent about September 1st. It contained a provision that it should take effect when countersigned by the local agent. It was not countersigned by the agent, nor ever delivered to the applicant, who was taken ill after the policy was received by the agent, and died on September 28th. Various questions were raised in the case; but it was disposed of on the ground that there was no completed contract of insurance because the policy was not countersigned by the agent nor delivered to the applicant. The court said in part: "All of these conditions, whether wise or not, reasonable or unreasonable, are within the power of the insurer to impose. The insurer is not bound to accept the proposal made, and may impose such additional requirements to create the contract as it sees fit. * * * The applicant in this case agreed that no contract should be consummated except upon delivery of the policy. This was a most important stipulation. Many troubles might arise between the application and the delivery which would induce the company not to contract. The party's health might fail; his habits might become such as to make him an undesirable person to insure; it might be ascertained that the answers made in the application to important questions were untrue. * * * It seems to me, therefore, that, if the policy in this case had not in fact been delivered to McCully, no contract had arisen between him and the company. * * * In no view of this case can I see that a contract was at any time consummated between the parties. The mere sending of the policy to the agent did not make the contract. Beyond the policy itself there was no evidence of a willingness to contract. It is unlike those cases where there was an antecedent completed contract, and the policy was but the mere formal expression of the previous contract. * * * McCully had no notice, actual or constructive, of the acceptance of his proposal, and, according to the authorities, at any time before such notice, if there had been an acceptance, it could have been withdrawn. The conditions upon which by the terms of the policy it was to take effect were never complied with, and the negotiations between the parties were never terminated by a mutual agreement between them.

That case was more favorable to plaintiff than this in the particular that the policy was in the hands of the local agent through whom the business had been transacted at a time when the applicant was alive and well; while here the special agent who took the application was not located in the same town, or state, and did not receive the policy during the applicant's lifetime. There is nothing

in this case to indicate that Bowen was in any way deceived or misled, or that he understood he would be insured until his policy was delivered to him while in good health as agreed in his contract.

We are constrained to hold, under the documentary history and undisputed facts of this case, that the tentative contract of insurance was never consummated by delivery of the policy to the applicant during his lifetime.

The judgment is therefore reversed, and no new trial granted.

APPELLATE COURT OF INDIANA.

DIVISION No. 1.

MARION TRUST CO..

vs.

BANKERS' LIFE ASS'N OF DES MOINES, IOWA. (No. 8,054.)*

Appeal from Superior Court, Marion County; Clarence E. Weir, Judge.

Action by the Marion Trust Company, administrator with the will annexed of the estate of Oliver H. Carson, against the Bankers' Life Association of Des Moines, Iowa. Judgment for defendant, and plaintiff appeals. Affirmed.

Frank G. West and Guilford A. Deitch, both of Indianapolis, for Appellant.

Wiley & Jones, of Indianapolis, and I. M. Earle, of Des Moines, Iowa, for Appellee.

SHEA, P. J.

The questions presented in this appeal are the same in all essential particulars as those involved and decided in the case of Stubbs et al. vs. Bankers' Life Association, on April 16, 1913, by this court, reported in 101 N. E. 638, and on the authority of that case the judgment in this case is affirmed.

* Decision rendered, Dec. 10, 1913. 103 N. E. Rep. 508.

APPELLATE COURT OF INDIANA.**DIVISION No. 2.****BROWN****vs.****BANKERS' LIFE ASS'N OF DES MOINES, Iowa. (No. 8,032.)***

Appeal from Superior Court, Marion County; Clarence E. Weir, Judge.

Action by Annie Brown against the Bankers' Life Association of Des Moines, Iowa. Judgment for defendant, and plaintiff appeals. Affirmed.

Frank G. West and Guilford A. Deitch, both of Indianapolis, for Appellant.

Wiley & Jones, of Indianapolis, and I. M. Earle, of Des Moines, Iowa, for Appellee.

LAIRY, C. J.

This was an action brought by appellant against appellee to recover on a certificate of insurance. The case was submitted to the trial court on an agreed statement of facts, and there was a finding and judgment in favor of appellee. The case of Stubbs et al. vs. Bankers' Life Association, 101 N. E. 638, in all essential respects, is identical with the case at bar, and decides all questions here involved adversely to appellant. On the authority of this case, and the case of Marion Trust Co., Adm'r, vs. Bankers' Life Association, *supra*, the judgment is affirmed.

* Decision rendered, Dec. 19, 1913. 103 N. E. Rep. 508.



BANGE, vs. SUPREME COUNCIL LEGION OF HONOR OF MISSOURI.*

(St. Louis Court of Appeals. Missouri.)

I. INSURANCE — LIFE INSURANCE — ACTIONS — BURDEN OF PROOF.

In an action on a benefit certificate, proof by the beneficiary of the death of the insured, coupled with the introduction in evidence of the certificate, makes out a *prima facie* case, casting on the defendant the burden of establishing its defense.

(For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.)

* Decision rendered, Dec. 2, 1913. 161 S. W. Rep. 352.

2. INSURANCE—MUTUAL BENEFIT INSURANCE—NOTICE OF CONTRIBUTIONS.

Where the by-laws of a mutual benefit association required notice of contributions called to be mailed to the member at his regular address, the mailing of such notices was a condition precedent to the right of the association to declare a forfeiture of the member's right to participate in death benefits.

(For other cases, see Insurance, Cent. Dig. §§ 1897-1902; Dec. Dig. § 751.)

3. INSURANCE—MUTUAL BENEFIT ASSOCIATION—SUSPENSION.

Where the by-laws of a mutual benefit association vested a discretion in the council whether to assume the burden of paying contributions for a member, and it was the custom to defer action thereon to the next meeting, the provisions for forfeiture of the member's rights for non-payment of contributions are not self-executing, and the suspension, if made, is necessarily deferred, even though notice is given, until the action of the council is had and the member is declared suspended.

(For other cases, see Insurance, Cent. Dig. §§ 1917, 1918; Dec. Dig. § 756.)

4. INSURANCE—MUTUAL BENEFIT INSURANCE—NOTICES.

Parties to an insurance contract may agree that the mailing of notices for contributions shall be notice to the member.

(For other cases, see Insurance, Cent. Dig. §§ 1897-1902; Dec. Dig. § 751.)

5. INSURANCE—MUTUAL BENEFIT INSURANCE—ACTIONS—JURY QUESTION.

In an action on a benefit certificate, the question of the insured's regular address *held* for the jury.

(For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.)

6. INSURANCE—MUTUAL BENEFIT INSURANCE—NOTICES.

Where the by-laws of a mutual benefit insurance association required the mailing to the members of notices of calls for assessment and of suspensions for nonpayment, and a member had thirty days after suspension in which to reinstate himself by payment, proof of actual receipt of the notice in time for the member to have exercised his rights is necessary to sustain a suspension, where they were not mailed to his regular address.

(For other cases, see Insurance, Cent. Dig. § 1919; Dec. Dig. § 757.)

7. INSURANCE—MUTUAL BENEFIT INSURANCE—NOTICES.

For the notice of suspension to conclude a forfeiture against a member of an insurance order, the notice must be an official one.

(For other cases, see Insurance, Cent. Dig. §§ 1917, 1918; Dec. Dig. § 756.)

8. INSURANCE—MUTUAL BENEFIT INSURANCE—"REGULAR ADDRESS."

The question of the regular address of a member of an insurance order is not identical with that of domicile, which depends on intention; the expression, "regular address," merely referring to the place where the member would be likely to get his mail.

(For other cases, see Insurance, Cent. Dig. §§ 1917, 1918; Dec. Dig. § 756.)

9. INSURANCE—MUTUAL BENEFIT ASSOCIATIONS—SUSPENSION—ACQUIESCE.

Where a member of an insurance order acquiesced in a suspension, his

beneficiary is bound by such acquiescence, even though the suspension was not legal.

(For other cases, see Insurance, Cent. Dig. §§ 1917, 1918; Dec. Dig. § 756.)

10. INSURANCE—MUTUAL BENEFIT INSURANCE—SUSPENSION—NOTICE.

For the acquiescence of a member of an insurance order in an illegal suspension to bind his beneficiary, it need not appear that the member had official notice of his suspension.

(For other cases, see Insurance, Cent. Dig. §§ 1917, 1918; Dec. Dig. § 756.)

Appeal from St. Louis Circuit Court, Eugene McQuilin, Judge.

Action by Minnie E. Bange against the Supreme Council Legion of Honor of Missouri. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

See, also, 153 Mo. App. 154, 132 S. W. 276.

James J. Donohoe, of St. Louis, for Appellant.
Kinealy & Kinealy, of St. Louis, for Respondent.



KEYS ET AL. vs. NATIONAL COUNCIL, KNIGHTS & LADIES OF SECURITY.*

(Kansas City Court of Appeals. Missouri.)

1. INSURANCE—FRATERNAL BENEFIT INSURANCE—WAIVER OF FORFEITURES.

The question whether a fraternal benefit association has followed a course of conduct as might waive a forfeiture of a certificate for nonpayment of dues is usually one for the jury.

(For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.)

2. INSURANCE—FRATERNAL BENEFIT INSURANCE—WAIVER OF FORFEITURES.

Waiver of forfeiture of a benefit certificate for nonpayment of dues by the acceptance of a premium is not based on contract or actual intention, but on estoppel to insist on conditions inconsistent with the acceptance or rejection of the premium.

(For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.)

3. INSURANCE—MUTUAL BENEFIT INSURANCE—WAIVER OF FORFEITURES—REVIVAL.

A forfeiture of a benefit certificate once waived cannot afterwards be revived.

(For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.)

4. INSURANCE—MUTUAL BENEFIT INSURANCE—WAIVER OF FORFEITURES.

As between the association and a beneficiary, the rule that actual knowledge of the cause of forfeiture must be shown to work a waiver will

* Decision rendered, Dec. 1, 1913. 161 S. W. Rep. 345.

not be applied, if it should have known of the facts by proper attention to its business.

(For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.)

5. INSURANCE—MUTUAL BENEFIT INSURANCE—WAIVER OF FORFEITURE—EVIDENCE.

Slight evidence showing an intention to waive a forfeiture of a mutual benefit certificate for nonpayment of premiums will prevent a forfeiture.

(For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.)

6. INSURANCE—WAIVER OF FORFEITURE.

A waiver of a forfeiture of a mutual benefit certificate may be inferred when the association, after knowledge of the cause of forfeiture, requires insured under the policy to do some act or incur some expense.

(For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.)

7. INSURANCE—FORFEITURES—WAIVER—JURY QUESTION.

In an action on a mutual benefit certificate defended on the ground of forfeiture by nonpayment of premiums for three months, and offering to pay such arrears while ill, whether the association by accepting such dues, and requesting the appointment of an administrator, waived the forfeiture *held* a jury question.

(For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.)

8. INSURANCE — MUTUAL BENEFIT INSURANCE — KNOWLEDGE OF AGENTS.

Knowledge of the local financial officer of a mutual benefit association that insured was more than 60 days in arrears when she was reinstated charged the association with such knowledge.

(For other cases, see Insurance, Cent. Dig. § 1836; Dec. Dig. § 695.)

9. INSURANCE—MUTUAL BENEFIT INSURANCE—ACTIONS—ADMISSION OF EVIDENCE.

The conduct of a mutual benefit association in not promptly and unequivocally declaring a forfeiture when it learned of insured's death on the day after paying dues in arrears, and instead, requesting the appointment of an administrator for insured, knowing she had no other property, could be considered in determining whether it had knowledge of her illness while retaining her premiums prior to her death, as well as on the question of waiver of the forfeiture after her death.

(For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.)

10. INSURANCE—WAIVER OF FORFEITURE.

A forfeiture for nonpayment of premiums is waived where a benefit association, with knowledge of the cause of forfeiture, causes plaintiff to incur additional expense in furnishing proof; that being an implied recognition of the continued validity of the certificate.

(For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.)

11. INSURANCE—MUTUAL BENEFIT INSURANCE—ACTIONS—ADMISSION OF EVIDENCE—WAIVER.

In an action on a mutual benefit certificate defended on the ground of forfeiture for nonpayment of premiums, evidence of the retention of back premiums paid after actual notice of insured's ill health when paying them, was admissible upon the question of the association's intention in originally receiving the premiums.

(For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.)

12. INSURANCE—MUTUAL BENEFIT INSURANCE—ADMISSION OF EVIDENCE—WAIVER OF FORFEITURE.

In an action on a mutual benefit certificate defended on the ground of forfeiture by nonpayment of premiums until after sickness, evidence that the association retained back premiums after actual notice of insured's ill health when she paid them was admissible, as showing a waiver of forfeiture by ratifying the act of the association's agent in theretofore accepting back premiums without a health certificate, so as to show that insured could rely on such a course.

(For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.)

13. INSURANCE—MUTUAL BENEFIT INSURANCE—ACTIONS—JURY QUESTION—WAIVER OF FORFEITURE.

In an action on a mutual benefit certificate claimed to have been forfeited by nonpayment of premiums, evidence held to make it a jury question whether the forfeiture was waived by failing to unequivocally declare a forfeiture on learning that the premiums were paid while insured was sick, and by requesting the appointment of a guardian for the beneficiaries.

(For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.)

14. INSURANCE — WAIVER OF FORFEITURES — ACCEPTANCE OF PREMIUMS.

By accepting and retaining back premiums with knowledge of insured's ill health when they were paid, a mutual benefit association waived a forfeiture for nonpayment.

(For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.)

15. INSURANCE—WAIVER OF FORFEITURE—RATIFICATION.

Though a mutual benefit association did not know that its agent had accepted back premiums after the time within which they could be paid, or while insured was in bad health, it ratified the agent's act by retaining them after learning that she was in bad health when the agent received them, so as to waive the forfeiture as of the time the agent accepted the premiums.

(For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.)

16. INSURANCE—MUTUAL BENEFIT INSURANCE—ADMISSION OF EVIDENCE.

In an action on a mutual benefit certificate defended on the ground of forfeiture by nonpayment of back premiums until insured was ill, evidence that insured's neighbors knew that she was sick was not admissible to show that the company had actual knowledge of her sickness.

(For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.)

Appeal from Circuit Court, Buchanan County; W. K. Amick, Judge.
Action by Claudio Keys and another against the National Council, Knights and Ladies of Security. From a judgment for plaintiffs, defendant appeals. Reversed and remanded for new trial.

W. E. Stringfellow, of St. Joseph, for Appellant.
F. W. Paschal, of St. Joseph, for Respondents.

METROPOLITAN LIFE INS. CO. *vs.* LEWIS. (No. 5,132.)*
(Court of Appeals of Georgia.)

1. APPEAL AND ERROR—DECISION ON PRIOR APPEAL—CONCLUSIVENESS.

The decision of this court in the case of *Metropolitan Life Insurance Co. vs. Morrow, for Use, etc.*, 10 Ga. App. 433, 73 S. E. 607, is conclusive upon the parties as to all questions then decided. The substantial effect of that decision was that the instrument declared on was an equitable assignment, and that the assignee, the plaintiff in this case, could maintain suit thereon, and, on proof of the essential facts alleged, would be entitled to recover.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.)

2. INSURANCE—ACTION—DEFENSE—PAYMENT TO ASSIGNOR.

It appearing from the evidence, without contradiction, that the assignment in question was made upon a valuable consideration, and that the defendant, whose debt to the assignor was the subject of the assignment, paid the debt to the assignor, without the consent of the plaintiff and after notice of the assignment, the court did not err in directing a verdict for the plaintiff.

(For other cases, see Insurance, Cent. Dig. §§ 1452, 1476-1478, 1481, 1482, 1485; Dec. Dig. § 593.)

3. EVIDENCE—ASSIGNMENT OF INSURANCE POLICY—PAROL EVIDENCE.

The court did not err in allowing the plaintiff to testify to oral negotiations between the assignor and himself, from which it appeared that, in consideration of his professional services to the assignor, the assignor agreed to make the assignment in question.

(For other cases, see Evidence, Cent. Dig. §§ 1966-1968; Dec. Dig. § 424.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by W. H. Lewis against the *Metropolitan Life Insurance Company*. Judgment for plaintiff, and defendant brings error. Affirmed.

Smith, Hammond & Smith, of Atlanta, for Plaintiff in Error.

Paul L. Lindsay, of Atlanta, for Defendant in Error.

* Decision rendered, Nov. 25, 1913. 80 S. E. Rep. 17. Syllabus by the Court.

FIDELITY MUT. LIFE INS. CO. vs. HAMILTON ET AL.*
 (Supreme Court of Arkansas.)

1. CONTRACTS — ACTIONS — PLEADING — MATTERS TO BE PROVED.

Where, in an action by a life insurance company to recover from its agent the amount of a first premium retained by him after the cancellation of policy, the answer admitted the execution of a contract between the parties but sought to avoid liability thereunder on the ground that it had been terminated, and the complaint alleged the part of the contract necessary to determine the rights of the parties, it was not necessary to introduce it in evidence.

(For other cases, see Contracts, Cent. Dig. §§ 1714, 1718-1751; Dec. Dig. § 346.)

2. INSURANCE — AGENTS — TERMINATION OF CONTRACT WITH.

Failure of a life insurance company to have sent to one of its agents a certificate of authority to transact business in the state pursuant to Kirby's Dig. § 4366, would not terminate a contract between the company and such agent but only suspended the agent's right to solicit insurance until he received the certificate; the statute prohibiting an agent from transacting business until procuring such certificate.

(For other cases, see Insurance, Cent. Dig. § 104; Dec. Dig. § 79.)

3. INSURANCE—AGENTS—ACTION FOR TERMINATION—SUFFICIENCY OF EVIDENCE.

Evidence, in an action by a life insurance company for a part of the first premium retained by an agent after the cancellation of the policy by the company, held to show that the parties had treated the contract between them as in existence when the agent procured the policy, though the company had not sent the agent a certificate of authority to procure business as was its custom.

(For other cases, see Insurance, Cent. Dig. §§ 107, 108; Dec. Dig. § 82.)

4. INSURANCE—ENFORCEMENT—ENFORCEMENT IN PART.

A life insurance agent cannot claim that his contract with the company was in force to allow him a commission on a policy procured and not in force as to other provisions requiring the execution of a bond, etc.

(For other cases, see Insurance, Cent. Dig. § 104; Dec. Dig. § 79.)

Appeal from Circuit Court, Ouachita County; Geo. W. Hays, Judge.
 Action by the Fidelity Mutual Life Insurance Company against A. Hamilton and others. From a judgment for defendants, plaintiff appeals. Reversed, and judgment rendered for plaintiff.

Rose, Hemingway, Cantrell & Loughborough, of Little Rock, for Appellant.

Powell & Taylor, of Camden, for Appellees.

* Decision rendered, Oct. 27, 1913. 160 S. W. Rep. 870.

ROBERTS *vs.* BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN.*

(Court of Appeals of Kentucky.)

INSURANCE—MUTUAL BENEFIT—DROPPING OF MEMBER.

A member of an order, having to his knowledge been dropped for non-payment of dues and assessments by proceedings regularly taken, and having made no application for reinstatement, as authorized by by-laws, and not having tendered his subsequent dues as they fell due, must be deemed to have acquiesced in the dropping of him, so that when he was killed two months later he was not a member in good standing, within his benefit certificate conditioned that he should keep himself in good standing.

(For other cases, see Insurance, Cent. Dig. § 1919; Dec. Dig. § 757.)

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by Mary F. Roberts, nee Reynolds, against the Brotherhood of Locomotive Firemen and Enginemen. Judgment for defendant, and plaintiff appeals. Affirmed.

Earl & Earl, of Louisville, for Appellant.
J. J. Kavanaugh, of Louisville, for Appellee.

* Decision rendered, Dec. 2, 1913. 160 S. W. Rep. 924.



INTERNATIONAL ORDER OF TWELVE KNIGHTS & DAUGHTERS OF TABOR *vs.* DENMAN.*

(Court of Civil Appeals of Texas. El Paso.)

1. TRIAL—JURY QUESTIONS.

In an action on an insurance policy, where the actual issuance of a policy was not controverted, the court properly assumed it as a fact.

(For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.)

2. INSURANCE—JURY QUESTIONS.

In an action on a life policy, where it was a question of fact whether the policy in the record was the one issued, the question was properly submitted to the jury.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

Appeal from Harris County Court; Clark C. Wren, Judge.
Action by A. L. Denman against the International Order of Twelve

* Decision rendered, Oct. 23, 1913. On rehearing, Nov. 13, 1913. 160 S. W. Rep. 980.

Knights and Daughters of Tabor. From a judgment for plaintiff, defendant appeals. Reversed and remanded on rehearing.

Fred R. Switzer, of Houston, for Appellant.
Jackson & Dickson, of Houston, for Appellee.



**JOHNSON ET AL. vs. KNIGHTS OF PYTHIAS OF NORTH
AND SOUTH AMERICA. (No. 5,082.)***

(Court of Appeals of Georgia.)

1. INSURANCE—ACTION ON POLICY—PETITION—DEMURRER.
It being inferable, from the allegation of the petition, that the beneficiary designated in the policy of life insurance sued on is still in life, the court did not err in sustaining a general demurrer to a suit brought by alleged heirs at law of the deceased, who are not designated in the policy of insurance as beneficiaries. Upon this point the decision is controlled by the ruling of this court in *Cain vs. Knights of Pythias*, 11 Ga. App. 364, 367, 75 S. E. 444.

(For other cases, see *Insurance*, Cent. Dig. §§ 1996-1998; Dec. Dig. § 815.)

2. INSURANCE—RECOVERY OF POLICY—WAIVER.

The invalidity of a beneficiary's claim of the right to collect the amount stipulated as payable under the terms of an insurance policy may be waived or asserted by the insurer as a defense, at the insurer's option. In the present case, it being inferable, from the allegations of the petition, that the insurer, with full knowledge of all the facts, has waived or may waive the beneficiary's disability, if any exists, the disability or disqualification of the beneficiary affords the plaintiffs no ground to recover upon the allegation that they are the sole heirs at law of the deceased.

(For other cases, see *Insurance*, Cent. Dig. §§ 1942, 1943; Dec. Dig. § 776.)

Error from City Court of Savannah; Davis Freeman, Judge.

Action by P. J. Johnson and others against the Knights of Pythias of North and South America. Judgment for defendant, and plaintiffs bring error. Affirmed.

Oliver & Oliver and W. S. Connerat, all of Savannah, for Plaintiffs in Error.

J. H. Kinkle and Geo. W. Owens, both of Savannah, for Defendant in Error.

* Decision rendered, Dec. 9, 1913. 80 S. E. Rep. 213. *Syllabus by the Court.*

BOEHMER ET AL. VS. KALK ET AL.*

(Supreme Court of Wisconsin.)

1. INSURANCE—LIFE POLICY—CHANGE OF BENEFICIARY—STATUTES.

The rule that one who insures his own life for the benefit of another and pays the premiums himself may at any time dispose of the policy or will it away without the beneficiary's consent was changed, so far as policies in favor of married women were concerned, by Laws 1891, c. 376, amending Rev. St. 1878, § 2347, so as to provide that a policy payable to a married woman or assigned to her, or to a trustee for her benefit, should be her sole and separate property, free from the control, disposition, or claims of her husband.

(For other cases, see Insurance, Cent. Dig. § 1469; Dec. Dig. § 587.)

2. CONSTITUTIONAL LAW—INSURANCE—DEPRIVATION OF PROPERTY—VESTED INTERESTS—INSURANCE POLICIES—DISPOSITION.

Laws 1891, c. 376, amending Rev. St. 1878, § 2347, providing that a life insurance policy payable to a married woman shall be her sole and separate property, free from the control, disposition, or claims of her husband, in so far as it provides that it shall apply to insurance effected before its passage, is unconstitutional as depriving the insured of a vested right to change the beneficiary and dispose of such policies at his election.

(For other cases, see Constitutional Law, Cent. Dig. §§ 176, 177, 181-185, 190-192, 194-200, 208, 213-224, 236; Dec. Dig. § 93; Insurance, Cent. Dig. § 1469; Dec. Dig. § 587.)

Appeal from Circuit Court, Milwaukee County; F. C. Eschweiler, Judge.

Action by Clara Boehmer and others against Anna M. Kalk, impleaded with the Northwestern Mutual Life Insurance Company. Judgment for defendant Kalk, and plaintiffs appeal. Affirmed.

W. O. Thomas, of Milwaukee, for Appellants.
Geo. L. Blum, of Eau Claire (V. W. James, of Eau Claire, of counsel), for Respondent.

* Decision rendered, Dec. 9, 1913. 144 N. W. Rep. 182.



RED MEN'S FRATERNAL ACCIDENT ASS'N OF AMERICA vs. RIPPEY. (No. 22,528.)*

(Supreme Court of Indiana.)

1. INSURANCE—EXTENT OF RISK—LIFE INSURANCE.

A certificate or policy of insurance may provide that there shall be no

* Decision rendered, Nov. 25, 1913. 103 N. E. Rep. 345.

liability on the part of the insurer if the insured die within a year from certain diseases specified in the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1955, 1957-1959; Dec. Dig. § 787.)

2. INSURANCE — ACTION ON POLICY — NEGATIVING DEFENSES—DEATH.

That death was due to a cause which by the certificate created no liability is a matter of defense and need not be negatived or anticipated by the complaint.

(For other cases, see Insurance, Cent. Dig. §§ 1996-1998; Dec. Dig. § 815.)

3. INSURANCE—ACTION ON POLICY—BURDEN OF PROOF.

In such case the burden rests on the insurer to prove the fact of death from such cause.

(For other cases, see Insurance, Cent. Dig. §§ 1999-2002; Dec. Dig. § 817.)

4. INSURANCE—DEFENSES—RETURN OF OPINION.

The insurer, defending an action on a fraternal benefit certificate on the ground that deceased had died of a disease and within a time which by the certificate created no liability therefor, was not required to return, or offer to return, any premiums before availing itself of the defense, since the certificate was in force from the beginning except as to death from the specified causes.

(For other cases, see Insurance, Cent. Dig. § 1991; Dec. Dig. § 809.)

5. TRIAL—CONFLICTING INSTRUCTIONS.

In an action on a fraternal beneficiary certificate, an instruction antagonistic to defendant's given instruction, which was a correct statement of a burden resting on it as to the return or tender of premiums, was error.

(For other cases, see Trial, Cent. Dig. §§ 564, 565; Dec. Dig. § 243.)

6. APPEAL AND ERROR—REVIEW—INSTRUCTIONS.

The rule that instructions will not be reviewed on appeal in the absence of the evidence does not apply to instructions which must be held erroneous if improper under any evidence admissible under the issues.

(For other cases, see Appeal and Error, Cent. Dig. §§ 2933-2935; Dec. Dig. § 701.)

7. TRIAL—INSTRUCTIONS—CONFORMITY TO ISSUES.

In an action on a fraternal beneficiary certificate, where defendant pleaded no forfeiture or rescission, instructions by the court on its own motion as to those matters were erroneous as being beyond the issues.

(For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.)

Appeal from Circuit Court, Washington County; Thomas B. Buskirk, Judge.

Action by Susan H. Rippey against the Red Men's Fraternal Accident Association of America. Judgment for plaintiff, and defendant appeals. Transferred from the Appellate Court under section 1405, Burns' Ann. St. 1908 (Acts 1901, p. 500). Reversed, and new trial granted.

W. W. Hottel, of Salem, for Appellant.
Mitchell & Mitchell, of Salem, for Appellee.

**KNIGHTS OF MACCABEES OF THE WORLD *vs.*
SHIELDS.***

(Court of Appeals of Kentucky.)

1. INSURANCE—MUTUAL BENEFIT CERTIFICATE—APPLICATION—APPLICATION FOR INCREASE—EFFECT.

Decedent applied for a certificate of \$1,000 in defendant insurance society and signed an application, including answers to questions as to his health, and forwarded the same, after which, and before a certificate for \$1,000 had been delivered, he applied to increase the certificate from \$1,000 to \$3,000, for which he was required to furnish an additional health certificate, which he signed, containing answers to further questions as to his health. *Held* that, since the increase would not have been granted without such additional certificate, the association was entitled to rely on false answers in it as well as in the original application to avoid the certificate issued for the increased amount.

(For other cases, see Insurance, Cent. Dig. §§ 1859-1865; Dec. Dig. § 723.)

2. INSURANCE—MUTUAL BENEFIT ASSOCIATIONS—MISREPRESENTATIONS—HEALTH—MATERIALITY.

Ky. St. § 639, provides that all statements or descriptions in any application for insurance shall be deemed representations and not warranties, and that no misrepresentation, unless material or fraudulent, shall prevent a recovery on the policy. *Held* that, since false answers to questions relative to insured's health are material and will avoid the certificate without reference to insured's good faith, evidence of statements made by insured to another physician that he had diabetes at a time prior to the date of his application was admissible to falsify answers in the application to the contrary and should not have been limited to its bearing on the question of insured's knowledge of such fact.

(For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.)

3. EVIDENCE—ADMISSIONS.

The rule that statements of assured made subsequent to the date of his application and health certificate, tending to impeach the verity of his answers, are inadmissible does not apply to fraternal insurance in which the beneficiary has no vested right.

(For other cases, see Evidence, Cent. Dig. §§ 989-993; Dec. Dig. § 252.)

4. INSURANCE—MUTUAL BENEFIT CERTIFICATE—DEFENSES—HOMICIDE—“OFFENDING PARTY.”

Whether insured, when killed in an altercation, was the “offending party,” within a provision of the fraternal insurance association's by-laws that no benefit should be paid on the death or disability of a member who was killed in any quarrel, controversy, or fight in which the member was the offending party, depended on an affirmative finding that he brought on the difficulty by advancing on his antagonist in a threatening manner with a stick or cane, which would be proper if he did so advance, unless assured believed in good faith and had reasonable ground to believe that he was then and there in danger of losing his life or suffering great bodily harm at the hands of his opponent, and it appeared to insured to be necessary that he should act in the manner he did to protect himself from the threatened assault of the latter.

* Decision rendered, Dec. 4, 1913. 160 S. W. Rep. 1043.

(For other cases, see Insurance, Cent. Dig. §§ 1955, 1957-1959; Dec. Dig. § 787.)

5. INSURANCE—ACTIONS—EVIDENCE.

Where insured was killed in a difficulty with another and the by-laws of defendant association prohibited a recovery under such circumstances, if the insured was the offending party, insured's general reputation for peace and quiet and evidence that he was a violent and dangerous man was irrelevant.

(For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.)

6. INSURANCE—MUTUAL BENEFIT CERTIFICATE—EVIDENCE.

In an action on a mutual benefit certificate, whether insured was married and how many children he had was incompetent.

(For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.)

7. EVIDENCE—RELEVANCY—EFFORTS TO COMPROMISE.

In an action of a mutual benefit policy, evidence of efforts to compromise the case is inadmissible.

(For other cases, see Evidence, Cent. Dig. §§ 745-751, 753; Dec. Dig. § 213.)

Appeal from Circuit Court, Nelson County.

Action by Dora Shields against the Knights of Maccabees of the World. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Nat. W. Halstead, of Bardstown, G. Allison Holland, of Lexington, and John A. Fulton, of Bardstown, for Appellant.
Kelley & Cherry, of Bardstown, for Appellee.



MASONIC LIFE ASS'N vs. ROBINSON.*

(Court of Appeals of Kentucky.)

1. APPEAL AND ERROR—REVIEW—MATTERS OF DISCRETION—CONTINUANCE.

The granting or denial of a continuance is largely a matter of discretion, and the action of the court thereon will not be disturbed on appeal, in the absence of abuse of discretion.

(For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 966.)

2. CONTINUANCE—GROUNDS—ABSENCE OF WITNESS—DILIGENCE.

In an action against a mutual benefit association, a continuance was granted at a term when defendant's general agent was present in court; the case being then set for a certain day in the next term of which such agent had knowledge. He promised defendant's attorneys that he would be present ready to testify, but when the case was reached for trial he was absent from the state and had been for about three months. There was no explanation of his absence nor intimation that it was

* Decision rendered, Dec. 10, 1913. 160 S. W. Rep. 1078.

the result of casualty or misfortune. *Held*, that his absence was not ground for a continuance.
(For other cases, see *Continuance*, Cent. Dig. §§ 69, 79, 85, 87, 88, 118, 128, 130, 132, 135, 141, 147; Dec. Dig. § 51.)

3. CONTINUANCE—ABSENT WITNESS—AFFIDAVIT—ADMISSIONABILITY.

Where an application for a continuance for absence of a witness was properly denied because of lack of diligence to secure the witness' presence and there was no explanation of his absence, the court properly denied defendant's request to permit the reading of the affidavit for continuance, or so much of it as was pertinent, as the deposition of the witness.

(For other cases, see *Continuance*, Cent. Dig. §§ 74-93; Dec. Dig. § 26.)

4. INSURANCE—MUTUAL BENEFIT SOCIETY—FRAUD—CONFIDENTIAL INFORMATION—ESTOPPEL.

Decedent applied for insurance in defendant association and submitted to a medical examination September 20, 1902, and the report of the medical examiner and application were received at defendant's office on the 23d following. On the succeeding day defendant addressed to two of decedent's neighbors a letter asking for confidential information concerning him, and by the answer of one of them was informed that decedent was not then in good health, that he had not always been in good health, that the writer did not believe him to be of a sound and robust constitution or a first-class risk for life insurance, that three years previously decedent had been afflicted with inflammatory rheumatism, and that the writer could not recommend him for membership. This letter was received by defendant on the same day that the policy was issued, and notwithstanding its contents defendant accepted premiums on the policy from insured for seven years without objection. *Held*, that defendant was estopped thereafter to defend an action on the policy because of alleged untrue statements concerning insured's health in his application.

(For other cases, see *Insurance*, Cent. Dig. §§ 1837, 1866-1868; Dec. Dig. § 724.)

5. INSURANCE — APPLICATION — MISSTATEMENTS — CONSTRUCTION BY AGENT—ESTOPPEL.

At the time decedent was being examined for life insurance in defendant association, the soliciting agent explained to him that a question whether he had been previously rejected applied only to rejection by defendant association and not by any other company; whereupon decedent answered in the negative. The medical examiner, who was present at the time, knew that decedent had been previously rejected by other companies. *Held*, that the medical examiner's knowledge was the knowledge of defendant, and that it was therefore estopped to deny liability because of insured's misstatement as applied to other rejections.

(For other cases, see *Insurance*, Cent. Dig. §§ 1837, 1866-1868; Dec. Dig. § 724.)

Appeal from Circuit Court, Jessamine County.
Action by Lizzie P. Robinson against the Masonic Life Association.
Judgment for plaintiff, and defendant appeals. Affirmed.

Harry D. Williams, of Buffalo N. Y., John H. Welch, of Nicholasville, and Samuel M. Wilson, of Lexington, for Appellant.

E. H. Gaither, of Harrodsburg, and E. B. Hoover, of Nicholasville, for Appellee.

McDONALD vs. NEW WORLD LIFE INS. CO.*

(Supreme Court of Washington.)

1. EVIDENCE—ACTION AGAINST PRINCIPAL—ADMISSION OF EVIDENCE.

In an action against an insurance company for commission for selling capital stock, printed matter purporting to have been issued by defendant was not admissible against it in the absence of proof that defendant authorized the issuance of the printed matter.

(For other cases, see Evidence, Cent. Dig. §§ 1538, 1559, 1560, 1562-1578, 1592; Dec. Dig. § 370.)

2. EVIDENCE—HEARSAY.

Evidence that another, who was not connected with defendant corporation, told plaintiff that certain printed matter exploiting the business of defendant insurance company was issued by defendant, was hearsay.

(For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.)

3. PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL—WAIVER—ACTION AGAINST AGENT.

One who, with full knowledge of the material facts, including the existence of the agency, elected to hold the agent liable, thereby discharged the principal.

(For other cases, see Principal and Agent, Cent. Dig. §§ 701-703; Dec. Dig. § 184.)

4. TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

If there was evidence making the requested instruction applicable, the Supreme Court cannot say that it was error to give the instruction on the ground that the jury might have found the facts otherwise.

(For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. § 252.)

Department 2. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by D. P. McDonald against the New World Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

T. A. E. Lally, John D. Carmody, and Pat. M. Tammany, all of Seattle, for Appellant.

James T. Lawler and William H. Burns, both of Seattle, for Respondent.

* Decision rendered, Dec. 2, 1913. 136 Pac. Rep. 702.

SUPREME RULING OF FRATERNAL MYSTIC CIRCLE
*vs. HANSEN.**

(Court of Civil Appeals of Texas. Galveston.)

1. INSURANCE — MUTUAL BENEFIT ASSOCIATION — REINSTATEMENT OF MEMBER—APPLICATION—WARRANTIES.

An application for reinstatement in a fraternal mutual benefit association having provided that the original application, under which the benefit certificate was issued, should be binding "as of the date of the application for reinstatement," and the original application having warranted that the member had not had certain diseases, the reinstatement was on a warranty that he had had none of those diseases after the certificate was issued and before the reinstatement.

(For other cases, see Insurance, Cent. Dig. § 1924; Dec. Dig. § 761.)

2. INSURANCE—WARRANTIES—BREACH.

In the absence of a statute limiting the effect of a breach of warranty, on which one is reinstated to membership in a fraternal mutual benefit association which has issued a benefit certificate on his life, that he has not had certain diseases, the breach works a forfeiture of the contract.

(For other cases, see Insurance, Cent. Dig. § 1924; Dec. Dig. § 761.)

3. INSURANCE—FRATERNAL ASSOCIATIONS—MISREPRESENTATIONS IN APPLICATION—STATUTES.

Acts 31st Leg. (1st Extra Sess.) c. 36, declaring untrue statements in an application for membership in a fraternal beneficiary association shall not prevent recovery on the benefit certificate unless shown to be material to risk, does not govern a certificate on a member reinstated before the act took effect.

(For other cases, see Insurance, Cent. Dig. § 1890; Dec. Dig. § 745.)

4. INSURANCE—FRATERNAL ASSOCIATIONS—APPLICATION—STATEMENTS MATERIAL TO THE RISK.

False statements that one had never had dysentery or any disease of the genital organs or undergone a surgical operation are material to the risk, within Acts 31st Leg. (1st Extra Sess.) c. 36, declaring untrue statements in an application for membership in a fraternal beneficiary association shall not prevent recovery on the benefit certificate unless shown to be material to the risk.

(For other cases, see Insurance, Cent. Dig. §§ 1859-1865; Dec. Dig. § 723.)

Appeal from Fayette County Court; George Wilrich, Judge.

Action by Ella Hansen against the Supreme Ruling of the Fraternal Mystic Circle. Judgment for plaintiff. Defendant appeals. Reversed and rendered.

Meador & Davis, of Dallas, for Appellant.
John T. Duncan, of La Grange, for Appellee.

* Decision rendered, Oct. 30, 1913. Rehearing denied, Nov. 13, 1913.
161 S. W. Rep. 54.

JOHNSON *vs.* NATIONAL LIFE INS. CO.*

(Supreme Court of Minnesota.)

1. INSURANCE—POLICY—FRAUD—MATERIALITY.

In an action on a life insurance policy, it is held construing Laws 1907, c. 220, § 5, par. 4 (Rev. Laws Supp. 1909, § 1695, par. 4, subd. 6):

- (a) That a material misrepresentation, made with intent to deceive and defraud, avoids the policy.
- (b) That a material misrepresentation, not made with intent to deceive and defraud, does not avoid the policy, unless the matter misrepresented increases the risk of loss; and if it does increase the risk of loss, the policy is avoided, regardless of the intent with which it was made.
- (c) That an immaterial misrepresentation, though made with intent to deceive and defraud, does not avoid the policy.

(For other cases, see Insurance, Cent. Dig. § 539; Dec. Dig. § 250.)

2. INSURANCE—ACTION ON POLICY—MISREPRESENTATIONS—QUESTIONS OF LAW AND FACT.

Whether a misrepresentation is material, and whether it increases the risk of loss, and whether it was made with intent to deceive and defraud, are usually questions of fact for the jury, with the burden of proof upon the insurer; but they may be for the court.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

3. INSURANCE—POLICY—MISREPRESENTATIONS—QUESTION FOR COURT.

The record concedes that the insured made an untrue statement in his application, which might have been found fraudulently made and material. The court left the question whether he did to the jury. This was error.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

(Additional Syllabus by Editorial Staff.)

4. INSURANCE—POLICY—"REPRESENTATION"—"WARRANTY."

As used in Laws 1907, c. 220, § 5, par. 4 (Rev. Laws Supp. 1909, § 1695, subd. 6, par. 4), requiring that a standard life insurance policy provides that all statements by insured shall, in the absence of fraud, be deemed representations, and not warranties, a "representation" is a statement proffered as a basis for an insurance contract, and must be substantially true, while a "warranty" is a statement or covenant of the contract, which must be strictly or literally fulfilled.

(For other cases, see Insurance, Cent. Dig. § 560; Dec. Dig. § 265.)

(For other definitions, see Words and Phrases, vol. 7, pp. 6108-6110; vol. 8, pp. 7306-7404, 7833.)

5. INSURANCE—ACTION ON POLICY—EVIDENCE.

In an action on a life insurance policy, wherein the defense was misrepresentations made by the insured in his application, it was error to admit in evidence the testimony of a physician as to the condition of insured four years prior to the application.

* Decision rendered, No. 28, 1913. 144 N. W. 218. Syllabus by the Court.

(For other cases, see Insurance, Cent. Dig. §§ 1677-1681, 1682-1685; Dec. Dig. § 655.)

Appeal from District Court, Swift County; G. E. Ovale, Judge.
Action by Mary Johnson against the National Life Insurance Company. Verdict for the plaintiff. From denial of an alternative motion for judgment or new trial, defendant appeals. Reversed.

Belden & Safford, of Minneapolis, for Appellant.
John I. Davis, of Benson (Davis & Michel, of Marshall, of counsel), for Respondent.



MODERN WOODMEN OF AMERICA *vs.* INTERNATIONAL TRUST CO.*

(Court of Appeals of Colorado.)

1. INSURANCE—FRATERNAL BENEFIT INSURANCE—ACTION—SUFFICIENCY OF EVIDENCE.

Evidence, in an action on a fraternal benefit policy, defended on the ground of misrepresentation by insured that he did not regularly use intoxicants, *held* to show that the use of intoxicants by insured was such that no conservative insurance society would have accepted insured as a risk with knowledge of his habits.

(For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.)

2. INSURANCE—FRATERNAL BENEFIT INSURANCE—ACTIONS—SUFFICIENCY OF EVIDENCE — KNOWLEDGE OF INSURED'S INTEMPERANCE.

Evidence, in an action on a fraternal benefit certificate, defended on the ground of misrepresentations by insured as to the extent of his use of intoxicants, *held* not to show that defendant's agent who assisted in organizing the local society had knowledge of insured's intemperate habits.

(For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.)

3. INSURANCE—FRATERNAL BENEFIT INSURANCE—KNOWLEDGE OF INSURED'S HABITS—NOTICE TO AGENT.

The fact that one authorized by a fraternal benefit society to organize a local camp was told by an old acquaintance of insured that insured drank too heavily to be a proper risk, and was told by another who knew insured well that he "was too much of a drinker, to [the speaker's] knowledge, for fraternalism," were mere vague opinions of the speakers, and not sufficient to charge the agent with the duty of investigating the extent of insured's indulgence in intoxicants.

(For other cases, see Insurance, Cent. Dig. §§ 1837, 1866-1868; Dec. Dig. § 724.)

4. INSURANCE—FRATERNAL BENEFIT INSURANCE—ACTION—SUFFICIENCY OF EVIDENCE—AUTHORITY OF AGENT.

Evidence, in an action on a fraternal benefit policy, *held* not to show that

* Decision rendered, July 14, 1913; Rehearing denied, Dec. 8, 1913. 136 Pac. Rep. 806.

one who solicited insured's application and forwarded it to the general offices had authority to organize a local society, or to do more than to select the examining physician and solicit and forward applications.

(For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.)

5. INSURANCE—FRATERNAL BENEFIT INSURANCE—MISREPRESENTATIONS—KNOWLEDGE BY AGENT—ESTOPPEL.

Where insured's misrepresentations to the soliciting agent of a fraternal association were willful, the fact that the agent knew that insured's statements were not true would not estop the company from avoiding the certificate upon that ground, since there can be no estoppel unless one of the parties is misled to his disadvantage.

(For other cases, see Insurance, Cent. Dig. §§ 1837, 1866-1868; Dec. Dig. § 724.)

6. COURTS—OPINIONS—DICTUM.

Where one of the parties claimed that a certain case controlled the decision and the other party claimed that other cases ruled, but the judge writing the opinion held that the statute controlled and based his decision thereon, any further remarks by him about the general rules of law applicable was obiter and not authority.

(For other cases, see Courts, Cent. Dig. § 335; Dec. Dig. § 92.)

7. INSURANCE—CONSTRUCTION OF CONTRACT.

In absence of statute, insurance contracts are construed by the same rules as other contracts, in order to effectuate the intention of the parties.

(For other cases, see Insurance, Cent. Dig. §§ 1870-1872; Dec. Dig. § 726.)

8. INSURANCE—FRATERNAL BENEFIT INSURANCE—AGENTS—RESTRICTION OF AUTHORITY.

In absence of statute, insurance companies may limit the authority of their agents, and an applicant dealing with an agent whose authority is expressly limited by the application cannot take advantage of any act of the agent in excess of such limited authority.

(For other cases, see Insurance, Cent. Dig. § 1836; Dec. Dig. § 695.)

9. CONSTITUTIONAL LAW—PROVINCE OF COURT—LEGISLATIVE FUNCTION.

It is for the legislature, and not for the courts, to change a well-established rule of law, such as the rule permitting insurance companies to limit the authority of their agents.

(For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.)

10. APPEAL AND ERROR—PRESENTATION BELOW.

Where plaintiff does not raise a question at trial or upon appeal until after oral argument, the appellate court is not inclined to consider the question, unless it is necessary to do so to prevent injustice.

(For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034; Dec. Dig. § 169.)

11. INSURANCE — FRATERNAL BENEFIT INSURANCE — RETURN OF ASSESSMENTS.

A fraternal benefit company need not tender a return of the premiums in order to forfeit a certificate on the ground of willful misrepresentations by insured in his application as to his intemperate habits, though assessments must be returned on forfeiture in case of an unintentional breach of warranty.

(For other cases, see Insurance, Cent. Dig. §§ 1917, 1918; Dec. Dig. § 756.)
Hurlbut and Morgan, JJ., dissenting.

Appeal from District Court, Denver County; Hubert L. Shattuck, Judge.

Action by the International Trust Company, as guardian of William Conter and Annie Conter, against the Modern Woodmen of America. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions to dismiss.

Truman Plantz, of Rock Island, Ill., Tully Scott, of Denver, and George G. Perrin, of Rock Island, Ill., for Appellant.

S. D. Crump and Henry C. Allen, both of Denver, for Appellee.



MUTUAL LIFE INS. CO. OF NEW YORK *vs.* GOOD.*

(Court of Appeals of Colorado.)

1. EVIDENCE—OPINION EVIDENCE—CONCLUSION OF WITNESS.

Testimony from the sister of the mother that a certain man was the father of assured was a mere conclusion of the witness.

(For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.)

2. PARENT AND CHILD—PRESUMPTION OF PATERNITY.

Where it appeared that assured's mother had never been the legal wife of a certain person by a common law or ceremonial marriage, there was no presumption of law that such person was assured's father, and the burden of proving that fact by a preponderance of the evidence was upon the person asserting it to defeat a life insurance policy.

(For other cases, see Parent and Child, Cent. Dig. §§ 1-3; Dec. Dig. § 1.)

3. TRIAL—KNOWLEDGE BY JURORS.

Jurors are permitted to use their common knowledge and observation of life in determining the question of paternity out of wedlock.

(For other cases, see Trial, Dec. Dig. § 311.)

4. PARENT AND CHILD—RELATIONSHIP—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action on a life insurance policy, in which it was claimed that a certain person who died of tuberculosis was assured's natural father, held to sustain a finding that such person was not assured's father.

(For other cases, see Parent and Child, Cent. Dig. §§ 1-3; Dec. Dig. § 1.)

5. APPEAL AND ERROR—ESTOPPEL TO ALLEGE ERROR—REQUEST BY APPELLANT.

Defendant insurance company cannot question a finding that its insurance policy would have been issued even had the company known of the existence of another policy held by insured, where it submitted the issue

* Decision rendered, Nov. 10, 1913. Rehearing denied, Dec. 8, 1913.
136 Pac. Rep. 821.

by requesting a charge that, if insured held another policy and defendant's policy would not have been issued had it known of the existence of the first, the jury should find for the defendant.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.)

6. TRIAL — RECEPTION OF EVIDENCE — EVIDENCE ADMISSIBLE IN PART.

Where the affidavit of a physician who had treated assured was admissible, in an action on a life policy, merely to show the falsity of the statement in the application that assured had only consulted a certain physician named in the last five years, but defendant did not ask that it be admitted for that particular purpose, there was no error in excluding the whole affidavit under Mills' Ann. St. 1912, § 8072, prohibiting evidence by a physician as to information acquired in attending a patient.

(For other cases, see Trial, Cent. Dig. § 120; Dec. Dig. § 48.)

7. APPEAL AND ERROR—ESTOPPEL TO ALLEGE ERROR.

Appellant cannot complain of instructions given at its request on the ground that some of them treated answers in insurance policies as warranties, while others treated them as representations.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.)

Appeal from District Court, Conejos County; Chas. C. Holbrook, Judge.

Action by Venita A. Good against the Mutual Life Insurance Company of New York. From a judgment for plaintiff, defendant appeals. Affirmed.

Macbeth & May, of Denver, for Appellant.

James D. Pilcher, of Alamosa, and Jesse Stephenson, of Monte Vista, for Appellee.

GRAND LODGE OF COLORED KNIGHTS OF PYTHIAS vs. SEAY. (No. 16,204.)*

(Supreme Court of Mississippi.)

INSURANCE—ACTION ON FRATERNAL BENEFICIARY CERTIFICATE—QUESTION FOR JURY.

In an action on a policy governed by by-laws providing that no liability should attach thereon until after thirty days from its issuance, where insured died within the thirty days, a peremptory instruction for defendant should have been given.

(For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.)

Appeal from Circuit Court, Warren County; H. C. Mounger, Judge.

Action by Leontine Seay against the Grand Lodge of Colored Knights of Pythias. Judgment for plaintiff, and defendant appeals. Reversed, and cause dismissed.

W. J. Latham, of Jackson, for Appellant.

H. H. Coleman, of Vicksburg, for Appellee.

* Decision rendered, Dec. 15, 1913. 63 Southern Rep. 571.

SPANDE vs. WESTERN LIFE INDEMNITY CO.*
(Supreme Court of Oregon.)

1. APPEAL AND ERROR—REVIEW—FORMER DECISION ON APPEAL.

A decision against plaintiff on a complaint on a benefit certificate, based on a contract between defendant and the order which had originally issued the certificate, does not bar a recovery on an amended complaint, based on defendant's representations that the certificate had been transferred to the defendant; that defendant would assume all obligations thereunder, and if plaintiff would pay to defendant the same premiums he was obliged to pay to the order, defendant would perform all the terms and conditions of the certificate.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1105.)

2. INSURANCE—MUTUAL BENEFIT INSURANCE—ACTIONS.

In an action on a benefit certificate, where plaintiff claims under the representations of defendant that the order which had originally issued the certificate had transferred the certificate to defendant, that defendant would assume all obligations thereunder, and that if plaintiff would pay defendant the premiums, defendant would perform the terms of the certificate, plaintiff is not bound to prove the terms of the contract between the order and defendant, but makes a case for the jury when he shows that defendant has promised to assume the burden of the order, and that, relying on such promise, plaintiff has paid defendant the premiums which would otherwise have been due the order.

(For other cases, see Insurance, Dec. Dig. § 699.)

3. INSURANCE—MUTUAL BENEFIT INSURANCE—ACTIONS—QUESTION FOR JURY.

In an action on a benefit certificate, evidence *held* sufficient, as against a motion for nonsuit, to show a contract of insurance by defendant by the assumption of the burden of the order which had originally issued the certificate.

(For other cases, see Insurance, Dec. Dig. § 699.)

4. CONTRACTS—CONSTRUCTION—PRACTICAL CONSTRUCTION BY PARTIES.

The conduct of the parties with respect to the subject-matter of a contract will be looked to as affording evidence of the meaning the parties gave to the agreement.

(For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.)

5. CONTRACTS—CONSTRUCTION—UNDERSTANDING OF PROMISOR.

The language of a contract must be interpreted in the sense that the promisor knew, or had reason to know, that the promisee understood it.

(For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.)

6. CONTRACTS—CONSTRUCTION—ADVERSE TO PARTY USING WORDS.

The words of a contract are to be strongly construed against the party using them.

(For other cases, see Contracts, Cent. Dig. § 736; Dec. Dig. § 155.)

* Decision rendered, Dec. 23, 1913. 136 Pac. Rep. 1189.

7. INSURANCE—MUTUAL BENEFIT INSURANCE—ACTIONS—BURDEN OF PROOF.

In an action against a defendant which has assumed the obligations of a benefit certificate which provides for the payment to plaintiff of the proceeds of one assessment, not exceeding \$2,000, plaintiff need not allege and prove what the proceeds of an assessment would be, but the burden is on defendant to show that it would be less than \$2,000.

(For other cases, see Insurance, Dec. Dig. § 669.)

8. INSURANCE—POWERS—ESTOPPEL TO DENY LIABILITY.

A company which has assumed the obligations of a fraternal order on a benefit certificate, and has accepted, without objection, plaintiff's dues from month to month, cannot escape liability on the ground that its contract with plaintiff is ultra vires.

(For other cases, see Insurance, Dec. Dig. § 699.)

Department 2. Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Action by H. A. Larsen Spande against the Western Life Indemnity Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Samuel White, of Portland (Manning & White, of Portland, on the brief), for Appellant.

G. C. Fulton, of Astoria, for Respondent.



**METROPOLITAN LIFE INS. CO. vs. FRANKEL
(No. 8,078.)***

(Appellate Court of Indiana, Division No. 1.)

1. PLEADING—REPLY—GENERAL DENIAL.

Where, in a suit on insurance policies on the life of plaintiff's wife, defendant's answer not only charged plaintiff with inducing his wife, in making the application, to fraudulently misrepresent her mental condition, but also alleged that plaintiff caused or contributed to his wife's death, the latter charge could not have been proved under a general denial; and hence, a reply merely alleging facts from which an estoppel might be raised as to the false representations was insufficient, under the rule that a reply which fails to respond to the entire answer to which it is addressed is insufficient and demurrable.

(For other cases, see Pleading, Cent. Dig. § 342; Dec. Dig. § 174.)

2. INSURANCE—LIFE POLICY—PROOF OF DEATH—TIME.

Where a life policy contains no specific time within which notice of death must be given, or provides merely that "due proof of death" must be given, notice of insured's death must be given within a reasonable time.

(For other cases, see Insurance, Cent. Dig. §§ 1328-1336; Dec. Dig. § 539.)

3. INSURANCE—NOTICE OF DEATH—"REASONABLE TIME"—QUESTION OF LAW OR FACT.

What is a reasonable time for giving notice or proof of loss ordinarily depends on the circumstances of the particular case, but if the delay is

* Decision rendered, Dec. 9, 1913. 103 N. E. Rep. 501.

considerable and is unexplained, and the facts are undisputed, whether notice has been given within a reasonable time is a question of law for the court.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

4. INSURANCE—LIFE POLICY—NOTICE OF DEATH—TIME.

Where a life policy required that due proof of death must be given, and a few days after insured's death an attorney was employed to make proofs of death, but they were not furnished for almost ninety days, and there was no explanation of the delay, it was inexcusable, and the notice was not given within a reasonable time.

(For other cases, see Insurance, Cent. Dig. §§ 1328-1336; Dec. Dig. § 539.)

Appeal from Superior Court, Marion County; Charles J. Orbison, Judge.

Action by Meyer Frankel against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

W. H. H. Miller, C. C. Shirley, S. D. Miller, and W. H. Thompson, all of Indianapolis, for Appellant.

Guilford A. Deitch and Henry Spaan, both of Indianapolis, for Appellee.

FIRE, TORNADO, ETC.**UNITED STATES DISTRICT COURT.**

W. D. WASHINGTON, S. D.

PALMER ET AL.*vs.*

OREGON-WASHINGTON R. & NAV. CO. (No. 1,367.)*

1. REMOVAL OF CAUSES—CITIZENSHIP OF PARTIES—REAL OR NOMINAL PARTIES.

Insurance companies which have paid policies on property destroyed by fire caused by the negligence of a third person and have by equitable principles or by the terms of the policies been subrogated to the right of action of the owner against such person may maintain an **action** thereon in their own name under the laws of Washington, which require actions to be brought in the name of the real party in interest and permit the assignment of such causes of action, and where they join with the owner as plaintiffs they are parties in interest, and not merely nominal parties for the purpose of determining the removability of the cause.

(For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.)

2. TRUSTS—CREATION—“EXPRESS TRUST.”

An “express trust” can be created only by agreement of the parties to the trust concerning it (citing 3 Words and Phrases, pp. 2611-2613.)

(For other cases, see Trusts, Cent. Dig. §§ 41, 41½; Dec. Dig. § 30½.)

At Law. Action by O. K. Palmer, doing business as the Palmer Lumber & Manufacturing Company, the Fireman’s Fund Insurance Company, the Norwich Union Fire Insurance Society, Limited, the London & Lancashire Fire Insurance Company, the National Fire Insurance Company, the Insurance Company of North America, the British America Assurance Company, and the Pennsylvania Fire Insurance Company, against the Oregon-Washington Railroad & Navigation Company. On motion to remand to state court. Granted.

Granger & Clarke, of Seattle, Wash., for Plaintiffs.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for Defendant.

CUSHMAN, D. J.

This matter is for decision upon a motion to remand the cause to the state court. The plaintiff Palmer is a citizen of Washington and resident of this district. The plaintiff insurance companies are corporations of California, Connecticut, Pennsylvania, and Great Britain, doing business in this state and district. The defendant is an Oregon corporation. The amount in controversy exceeds \$3,000.

* Decision rendered, Oct. 22, 1913. 208 Fed. Rep. 666.

The suit is one to recover for the loss, by fire, of the mill of the plaintiff Palmer, alleged to have been caused by the defendant's negligence. It appears that the plaintiff companies had insured the mill and paid the plaintiff Palmer, on account of its destruction, part of the loss alleged to have been caused, under policies of insurance providing:—

"If this company (the insurance company) shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured, on receiving such payment."

Plaintiff relies upon the following authorities: Fireman's Fund Ins. Co. vs. O. R. & N., 58 Wash. 332, 76 Pac. 1075; Pratt v. Radford, 52 Wis. 114, 8 N. W. 606; Wunderlich vs. C. N. W., 93 Wis. 132, 66 N. W. 1144; Gaugler vs. C. M., P. S. R. R. Co. (U. S. D. C., Mont.) 197 Fed. 79; Smith vs. Lyon, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635; Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264; Dickerson vs. Spokane, 26 Wash. 292, 66 Pac. 381; McElroy vs. Williams, 14 Wash. 627, 45 Pac. 306; State ex rel Adjustment Co. vs. Superior Court, 67 Wash. 355, 121 Pac. 847; Continental Ins. Co. vs. Loud, 93 Mich. 139, 53 N. W. 394, 32 Am. St. Rep. 494; Fairbanks et al. vs. Ry. Co., 115 Cal. 579, 47 Pac. 450; United Coal Co. vs. Canon City Coal Co., 24 Colo. 116, 48 Pac. 1045; State Ins. Co. vs. Oregon Ry. & Nav. Co., 20 Or. 563, 26 Pac. 838; Fireman's Ins. Co. vs. Oregon Ry. & Nav. Co., 45 Or. 53, 76 Pac. 1075, 67 L. R. A. 161, 2 Ann. Cas. 360; First Presbyterian Society vs. Goodrich Trans. Co. (C. C.) 7 Fed. 257; Glenn vs. Marbury, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. Ed. 790; Kansas Midland Ry. Co. vs. Brehm, 54 Kan. 751, 39 Pac. 690; Liverpool & G. W. S. S. Co. vs. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; City of New Orleans vs. Whitney, 138 U. S. 595, 11 Sup. Ct. 428, 34 L. Ed. 1106; Downs vs. Pioneer Mutual Ins. Co., 41 Wash. 372, 83 Pac. 423; Thompson vs. Cent. Ohio R. R. Co., 6 Wall. 134, 18 L. Ed. 765; Delaware Co. vs. Diebold Safe & Lock Co., 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 680; Mexican Cent. R. R. Co. vs. Eckman, 187 U. S. 429, 23 Sup. Ct. 211, 47 L. Ed. 247; Over vs. R. R. Co (C. C.) 63 Fed. 34; Evans vs. Durango Land Co., 80 Fed. 433, 25 C. C. A. 531.

The following cases are relied upon by defendant: Slauson vs. Schwabacher Bros. & Co., 4 Wash. 783, 31 Pac. 329, 31 Am. St. Rep. 918; Hall & Long vs. R. R. Companies, 13 Wall. 367, 20 L. Ed. 594; Norwich Union Fire Ins. Society vs. Standard Oil Co., 59 Fed. 984, 8 C. C. A. 433; Turk vs. Ill. Cent. Ry. Co. (D. C.) 193 Fed. 252; Kansas City M. & O. R. Co. vs. Shutt, 24 Okl. 96, 104 Pac. 51, 138 Am. St. Rep. 870, 20 Ann. Cas. 255.

It is conceded that, if the insurance companies are necessary

parties to the action, the motion to remand is well taken. *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264; *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 52 L. Ed. 904, 14 Ann. Cas. 1164; *Ex parte Harding*, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392.

At common law, Palmer, the holder of the legal cause of action, alone, could sue, and the insurance companies, if joined, on the motion to remand, would be held merely nominal parties, whose citizenship and residence would not affect the jurisdiction. *First Pres. Society of Green Bay vs. Goodrich Trans. Co.* (C. C.) 7 Fed. 257; *London Assurance Co. vs. Sainsbury*, 3 Doug. 245; *Mason vs. Sainsbury*, *Id.* 60; *Yates vs. Whyte*, 4 Bing. (N. C.) 272; *Hart vs. Western R. Corporation*, 13 Metc. 105, 46 Am. Dec. 719; *Rockingham Mut. Fire Ins. Co. vs. Bosher*, 39 Me. 254, 63 Am. Dec. 618; *Conn. Mut. Life Ins. Co. vs. N. Y., etc., R. Co.*, 25 Conn. 270, 65 Am. Dec. 571; *Peoria Ins. Co. vs. Frost*, 37 Ill 333.

A different rule is admitted to exist in code states. *Glenn vs. Marbury*, 145 U. S. 499 at 511, 12 Sup. Ct. 914, 36 L. Ed. 790.

The law of the state of Washington as to necessary parties is controlling in this court. *Thompson vs. Railroad Co.*, 6 Wall. 134, 18 L. Ed. 765.

The Washington statute provides:—

"There shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil action." *Pierce's Code* 1912, tit. 81—3.

"Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided by law." *Pierce's Code* 1912, 81—7.

"An executor or administrator, or guardian of a minor or person of unsound mind, a trustee of an express trust, or a person authorized by statute may sue without joining the person for whose benefit the suit is prosecuted. A trustee of an express trust within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." *Pierce's Code* 1912, 81—9.

"The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall cause them to be brought in." *Pierce's Code* 1912, tit. 81—41.

"The defendant may set forth by answer as many defenses and counterclaims as he may have whether they be such as have been heretofore denominated legal or equitable, or both. They shall each be separately stated, and refer to the causes of action which they are intended to answer, in such a manner that they may be

intelligibly distinguished." Paragraph 3, title 81—237, Pierce's Code 1912.

[1] Under the foregoing provisions, in the state of Washington, an insurance company, under the circumstances in this case, would be held a party in interest and could sue in its own name. *McElroy vs. Williams*, 14 Wash. 627, 45 Pac. 306; *Fireman's Fund Ins. Co. vs. O. R. & N. Co.*, 58 Wash. 332, 108 Pac. 770; *State of Washington ex rel. Adjustment Co. vs. Superior Court*, 67 Wash. 355, 121 Pac. 847.

[2] An "express trust" can only be created by agreement of the parties to the trust concerning it. *Words & Phrases, "Express Trust,"* vol. 3, p. 2611.

The right in the plaintiff insurance companies, upon the payment of Palmer's loss, through subrogation, was created by operation of equitable principles, and not created, but rather recognized, by the terms of the insurance policy. *New Orleans vs. Gaines' Adm'r (Whitney)*, 138 U. S. 595, 11 Sup. Ct. 428, 34 L. Ed. 1106; *Liverpool & G. W. S. S. Co. vs. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788.

Choses in action are not assignable at common law. *Glenn vs. Marbury*, supra, 145 U. S. 499, at 507, et seq., 12 Sup. Ct. 914, 36 L. Ed. 790.

In Washington, a cause of action for the tortious destruction of, or injury to, property is assignable. *Jordan vs. Welch*, 61 Wash. 569, 112 Pac. 656.

As pointed out, the right of the insurance companies to sue is by virtue of this subrogation to the right of the insured, upon payment of his loss. While it may be called an equitable assignment, there is not the opportunity in such case to fraudulently confer, or deprive the court of, jurisdiction as there is by means of a simulated legal assignment. *New Orleans vs. Gaines' Adm'r (Whitney)*, 138 U. S. 595, at 606, 11 Sup. Ct. 428, 34 L. Ed. 1102, supra.

Under the statutes of the state of Washington and the decisions of its courts, the insurance companies are held to be real parties in interest, and therefore necessary parties.

Turk vs. Illinois Central Railway (D. C.) 193 Fed. 252, relied upon by defendant, was a case in which it was held that a right of action for tort, either in whole or in part, was not assignable. If such is the law in Kentucky, where this case arose, it would be controlling of the decision and distinguish it from the law of this state. The same is true of the case of *Over vs. Lake Erie & W. R. Co. (C. C.)* 63 Fed. 34, also relied upon by defendant. As shown, such a right is assignable in Washington. *Jordan vs. Welch*, 61 Wash. 569, 112 Pac. 656.

The motion to remand is granted.

SUPREME JUDICIAL COURT OF MAINE**DOLLIVER***vs.***GRANITE STATE FIRE INS. CO.*****1. INSURANCE—FORFEITURE—VACANCY—“VOID.”**

Fire insurance policies in the Maine standard form, expiring in December, 1913, and December, 1914, provided that they should be void if the premises should become vacant and so remain for more than thirty days without the previous assent of the insurer in writing. The premises were vacant without such assent from January 31 to June, 1912, after which they were occupied until July 28, 1912, when the loss occurred. Rev. St. c. 1, § 6, par. 1, provides that words and phrases shall be construed according to the common meaning of the language. *Held*, that the word “void” meant null, of no effect, and that the force of the provision did not depend upon an increase of risk, but that the vacancy worked a forfeiture and not merely a suspension of risk, so that the subsequent occupancy did not revive the policy.

(For other cases, see Insurance, Cent. Dig. §§ 764-779; Dec. Dig. § 323.)

(For other definitions, see Words and Phrases, vol. 8, pp. 7332-7339, 7830.)

2. INSURANCE—FORFEITURE—VACANCY—WAIVER.

An insurer may waive a breach of a provision for forfeiture in case of vacancy without its assent.

(For other cases, see Insurance, Cent. Dig. § 941; Dec. Dig. § 372.)

Report from Supreme Judicial Court, Hancock County, at Law.

Action by Clifton E. Dolliver against the Granite State Fire Insurance Company. On report from Supreme Judicial Court. Judgment for defendant.

Argued before Savage, C. J., and Spear, Cornish, King, Bird, and Philbrook, JJ.

Edward S. Clark, of Bar Harbor, for Plaintiff.
John E. Nelson, of Augusta, for Defendant.

CORNISH, J.

Several questions are raised in defense to this action on two fire insurance policies, but it is necessary for this court to consider only one, namely, the legal effect of the breach of contract as to occupancy.

The policies were dated, respectively, December, 8, 1909, and December 13, 1911, were issued for a term of three years, and covered farm buildings in the town of Trenton. When the first policy was issued, the plaintiff was living with his family upon the premises and making his home there. In June, 1910, he

* Decision rendered, Dec. 10, 1913. 89 Atl. Rep. 8.

moved with his family to Bar Harbor and has since resided in that town, but he claims to have kept workmen as tenants in the insured premises until about January 1, 1912, and we think the evidence fairly supports this contention. The buildings therefore were occupied when the policies were issued.

On January 1, 1912, the premises being then unoccupied, the plaintiff secured thirty-day vacancy permits from the defendant's agent, which expired January 31, 1912. But the premises remained unoccupied until June 18, 1912, when other workmen for the plaintiff entered into possession and continued to occupy the buildings until July 28, 1912, when the fire occurred.

The policies were of the Maine standard form adopted by the Legislature in 1895, and each contained the usual provision, "This policy shall be void * * * if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent;" such assent having been previously defined as "in writing or in print of the company." It being conceded that the written assent to vacancy issued on January 1, 1912, expired on January 31, 1912, and that no other permit was given, it follows that by their own terms the policies were rendered void because of the subsequent vacancy extending to June 18, 1912, unless, as claimed by the learned counsel for the plaintiff, the reoccupation begun on June 18, and continued till the time of the fire, of itself revivified the contract and restored the plaintiff to his former rights. Did it have the legal effect?

This is a question raised sharply for the first time in this state and because of its consequences is deserving of the most careful consideration.

Especially is this true because the decisions in other jurisdictions are not in harmony.

The policy contains 11 distinct conditions, the violation of any one of which renders it void. One of these, false representation in the application, relates to matters antedating the policy; nine others, viz., other insurance, removal, increase of risk, sale, vacancy for more than 30 days, manufacturing later than 9 o'clock p. m., or ceasing operations more than 30 days, keeping of gunpowder or other like articles contrary to law, keeping of camphene, benzine, naphtha, or other chemical oils, all relate to matters while the policy is in force, while the eleventh fraud, relates to acts either before or after the loss.

An examination of the authorities reveals the fact that in some states the courts have held that the breach of these conditions does not render the policy void but merely suspends its operation, and, when the breach ceases, the policy again attaches. They make it a case of suspended animation rather than of death. But it would seem that in order to do this they ignore the plain words of the contract and seek to reach a conclusion which under the circum-

stances might seem fairer to the assured, working out what they conceive to be "substantial justice."

The reasons given for these decisions do not commend themselves to our judgment.

In some cases the later decisions are based upon earlier ones arising under a different form of policy where the temporary suspension was expressly provided for, but the distinction is not noted, or, if noted, the earlier is followed, notwithstanding the changed contract.

For instance, three early cases are often cited as authority for the doctrine of revivification, viz., Lounsbury vs. Insurance Co., 8 Conn. 458 (1831), 21 Am. Dec. 686; Phoenix Ins. Co. vs. Lawrence, 4 Metc. (Ky.) 9, 91 Am. Dec. 521 (1862); and U. S. F. & M. Ins. Co. vs. Kimberley, 34 Md. 224, 6 Am. Rep. 325 (1870); but in each of them the policy provided, not that it should be void in case the property were used contrary to the conditions specified, but that, "so long as the same shall be so appropriated, applied or used, these presents shall cease and be of no effect." It is obvious that under that plain language the policy was suspended by its own terms, but when that language was abandoned, and it was provided that the policy should be "void," it is difficult to see how these early decisions form any precedent in favor of the doctrine of suspension. In fact they are authorities against it.

Yet these decisions among others, are cited as authorities in Athens Mutual Ins. Co. vs. Toney, 1 Ga. App. 492, 57 S. E. 1913 (1907), one of the more recent cases that adopts the theory of suspension and revivification.

Along the same lines are the decisions in Illinois. The earliest case on this subject in that state, and the one often cited by that court as the leading case, is New England F. & M. Ins. Co. vs. Wetmore, 32 Ill. 221 (1865.)

But the policy in that case provided, as in the other early cases before referred to, that, if the premises should be appropriated to any prohibited use, then, "so long as the same shall be so appropriated, applied, or used these presents shall cease and be of no force or effect"; and the court say: "The import of this language it seems to us, is most clear, not that this policy should be absolutely void to all intents and purposes, if the premises are misappropriated, but only while they are so improperly used, the insurance shall have no effect." With this construction we can have no quarrel, because plain words are given their plain meaning.

But following this the Illinois court have extended the doctrine even to the cases where the policy contains the word "void," as in Germania Fire Ins. Co. vs. Klewer, 129 Ill. 599, 22 N. E. 489 (1889), and Traders' Ins. Co. vs. Catlin, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595 (1896).

In Germania Fire Ins. Co. vs. Klewer, supra, the court went so

far as to hold that, while the policy provided that it should be void in case of other insurance existing at the time the policy was taken out, the legal effect was, not to avoid the second policy, the one in suit, but to suspend it until the expiration of the prior policy, and then it would come into full force.

Our court has squarely rejected such a doctrine in a case arising under the same clause and presenting the same point. *Bigelow vs. Insurance Co.*, 94 Me. 39, 46 Atl. 808. The opinion concludes: "By the express terms of the policy in suit the defendant company is absolved from all liability thereunder." To the same effect are *Jersey City Ins. Co. vs. Nichol*, 35 N. J. Eq. 291, 40 Am. Rep. 625; *Insurance Co. vs. Rosenfield*, 95 Fed. 358, 37 C. C. A. 96; and *Carleton vs. Insurance Co.*, 109 Me. 79, 82 Atl. 649, 39 L. R. A. (N. S.) 951.

In *Traders' Ins. Co. vs. Catlin*, *supra*, the question arose over changes in the property that increased the hazard, and the court held that if the changed conditions had ceased to exist before the fire, leaving the risk no more hazardous than before, the policy again became in force. The court say: "If a loss occurs during the increased hazard, it would defeat a recovery. If a former increase of hazard has ceased to exist, and that increase of hazard at that former time in no way has affected the risk when the loss occurs, no reason exists why a forfeiture should result from a cause which occasions no damage."

This clearly shows the reasoning of the Illinois court. It is based upon increase of risk at the time of the fire, and whether or not the specific conditions have in the meantime been broken, they hold to be of no consequence, providing the situation has been restored. They applied the same rule by way of dictum in case of vacancy in *Insurance Co. vs. Garland*, 108 Ill. 220, and it is the rule of the early case of *Insurance Co. vs. Wetmore*, *supra*, applied to an entirely different policy.

This same idea of construing the policy, not according to its own plain terms but according to an arbitrary and unauthorized standard increase of risk at the time of the loss, forms the basis of many of the decisions which hold to the doctrine of intermittent liability.

In *Athens Mutual Ins. Co. vs. Toney*, *supra*, after citing the early decisions before referred to and others, including decisions from Illinois, the court say: "We place our decision squarely on the proposition that the violation of the condition as to vacancy in this case in no wise contributed to the loss. The increased hazard existed while the house was vacant, but when the house was re-occupied the danger from vacancy terminated, and the policy again attached and became of binding effect, and the company was liable for the loss." The same reason is given in *Born vs. Insurance Co.*, 110 Iowa, 379, 81 N. W. 676, 80 m. St. Rep. 300 (1900), when construing the clause against incumbrance, and in *Insurance Co. vs. Pitts*, 88 Miss. 587, 41 South. 5, 7 L. R. A.

(N. S.) 627, 9 Ann. Cas. 54 (1906,) when construing the clause as to vacancy.

Here again our own court has taken the directly opposite view and has rejected the doctrine that the effect of vacancy, under the present form of policy depends upon the increase of risk.

Prior to the enactment of the standard policy in this state in 1895, there was a general statutory provision (passed in 1861) of this tenor: "A change in the property insured, or in its use or occupation, or a breach of any of the terms of the policy by the insured, do not affect the policy unless they materially increase the risk." R. S. 1883, c. 49, § 20.

And under this statute it was held that the breach of the condition as to vacancy did not, in the absence of fraud, affect the contract of insurance unless the risk was thereby materially increased. *Cannell vs. Insurance Co.*, 59 Me. 582; *Thayer vs. Insurance Co.*, 70 Me. 531. It is evident that in such cases reoccupancy would keep the policy valid.

But the enactment of the standard form of policy repealed the general statute of 1861, supra, so that the question of increase of risk no longer affects the condition as to vacancy. *Knowlton vs. Insurance Co.*, 100 Me. 481, 62 Atl. 289, 2 L. R. A. (N. S.) 517. The court made use of this emphatic language which is significant in the case at bar:—

"In the light of experience, however, it was practicable to specify ten conditions or changes in the situation of the property, each of which would render the policy void without opening to actual inquiry the question of the increase of the risk. The language of the standard policy is not to be construed to mean that an issue of fact is to be raised upon the question of increase of risk under each of the independent clauses in question. It would not be reasonable to suppose that the Legislature contemplated a judicial inquiry under the clause relating to the keeping of gunpowder or naphtha or under the clause respecting other insurance on the property, or the clause in regard to the sale of the property and the assignment of the policy without the assent of the company, as there specified. With no greater or better reason can it be claimed that the question of increase of risk is open under the clause rendering the policy void for vacancy or nonoccupancy. It is an independent and absolute stipulation that the policy shall be void if the premises become vacant and remain so for more than thirty days, as there specified. It is not qualified by any other clause in the policy."

It is unnecessary to further analyze or comment upon the decisions holding that the violation of the plain terms of the contract as to vacancy creates only a suspension of liability. Such a construction would seem to be a perversion of the clear and explicit terms of the contract, a creation rather than an interpretation.

In our opinion no better statement can be made of their lack

of convincing power than that by Ostrander on Insurance (2d Ed.) § 145, viz.: "Regarding the purpose of this provision to be the protection of the insurer from such changes in the circumstances of the risk as would increase the hazard of fire, the courts have sometimes held that although the building becomes vacant and unoccupied during the term of the policy, if it was actually occupied when the fire occurred, the insurer would be held. These decisions appear to be based on the principle, which is not exactly cardinal in the law, that 'substantial justice' need be secured at all hazards. It must be admitted that if no harm comes to the risk during the period of its abandonment, and if it is in the care of an occupant at the time of the loss, no important interest of the insurer is prejudiced on account of the temporary vacancy, and in such case there is an apparent hardship to the honest claimant, if the insurer is excused from paying the loss. But may the courts properly interfere to prevent the execution of a contract, which the parties were competent to make and did make in the exercise of their natural and constitutional rights? The policy plainly enough provides that on the happening of a certain event it shall be void. The event occurred, and the obligation of the insurance company then terminated. Unless the court has the power to create for the parties a different contract than the one they created for themselves, it can do nothing to relieve the situation; and, when the courts undertake to correct mistakes of persons by taking away their right to make contracts, the well-meant effort in the long run is likely to produce more evil than good."

Let us now turn to the line of authorities holding that the contract should be interpreted as meaning, what its language clearly expresses, that a violation of its conditions works a forfeiture and not merely a temporary suspension.

The Supreme Court of the United States in *Imperial Fire Ins. Co. vs. Coos Co.*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231, had under consideration a clause rendering the policy void if "mechanics are employed in building, altering, or repairing the premises" and in an exhaustive opinion held that the violation of this condition relieved the insurer from responsibility, although the fire did not occur in consequence of the alterations or repairs.

The reasons are stated as follows:—

"Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guarantee the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability."

ity, and in order to recover the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

In *Mead vs. Insurance Co.*, 7 N. Y. 530, the same doctrine was held applicable to the prohibited use of camphene, which had ceased before the fire, and upon the point of revival the court say: "The only question in my mind is whether the use of the prohibited article at one period of the time for which the policy should by its terms continue will avoid the policy in a case where the loss occurred at a time subsequent to such use. For the purposes of this question, it should be treated the same as if the use of the camphene had been permanently discontinued before the occurrence of the fire which destroyed the property. A warranty in a contract of insurance is in the nature of a condition precedent. It is settled by numerous decisions that, if the warranty is violated, it avoids the policy, and it is immaterial whether the breach affects the risk or is connected with the loss or not. It would seem, in theory, that it was equally immaterial whether the act or thing to which the warranty related continued up to the time of the loss or had ceased or been discontinued before. The amount of it is, the defendants undertook to indemnify the plaintiff against damage or loss by fire, etc., upon condition that certain stipulations were observed and kept by and on behalf of the plaintiff and not otherwise. If the plaintiff failed to perform those stipulations, the defendants' liability to indemnify ceased. Could the plaintiff revive at pleasure by fulfilling his agreement in this case by removing the camphene? If he could in one instance he could, for aught I see, in any number of cases. I incline to the opinion that this could not be done in any case without the consent of the defendants, and that the only safe rule is to hold the contract of insurance at an end the moment the warranty is broken, and that it cannot be revived again without the consent of both parties, unless the insurer has by some act or line of conduct waived the breach or violation of the warranty."

In *Reynolds vs. Insurance Co.*, 107 Md. 110, 68 Atl. 262, 15

L. R. A. (N. S.) 345 (1907), a violation of a provision requiring an inventory to be taken within thirty days rendered the policy void, even though one was taken within fourteen days after the expiration of the required time. "It may seem to be a hard rule," say the court, "to declare a policy forfeited for some act of omission or commission which in point of fact was not the cause of the fire and actually did no injury to the insurer; but when parties enter into contracts which are not prohibited by law, and are declared by the courts to be reasonable regulations, upon what principle can a court revive a policy, which by its terms was null and void, simply because the insurer sustained no injury by reason of the insured's failure to do what is required of him? After this policy became null and void, the insured could not, by his act alone, revive it so as to bind the insurer."

In *Bemis vs. Insurance Co.*, 200 Pa. 340, 49 Atl. 769 (1901), a provision avoiding the policy in case of a change of title was held to be violated by giving a warranty deed, although a reconveyance was made prior to the fire.

The earlier decisions in Massachusetts seem to favor the doctrine of suspension and revival on the ground of no increase of risk, but the later decisions have rather repudiated it and have taken the opposite view. In *Hinckley vs. Insurance Co.*, 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445, the court held that the temporary use of a bowling alley and pool room without a license did not render the policy void but merely inoperative for the time being.

In *Ring vs. Assurance Co.*, 145 Mass. 426, 14 N. E. 525, the same doctrine was applied to the insurance of chattels, in a house described as "occupied all the year round" when it appeared that for several weeks the house had been unoccupied but was occupied at the time of the fire. *Hinckley vs. Insurance Co.*, *supra*, was cited with approval, but it should be noted that the effect of the nonoccupancy upon the insurance on the house itself was not involved.

In *Kyte vs. Insurance Co.*, 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508, the increase of risk clause was under consideration; the insured having used the premises for the illegal sale of intoxicating liquors during a substantial portion of the term of the policy, but afterwards and before the fire having obtained a license therefor. The court below instructed the jury that, if the use of the premises which increased the risk was merely temporary and ceased before the fire, the plaintiff could recover. The law court reversed this ruling and held that the policy was not merely suspended but might be treated by the company as wholly void.

The court also took occasion to refer to *Hinckley vs. Insurance Co.*, *supra*, and to say that the court in that case should have rested its decision upon another ground, "leaving it an open question whether a departure from the terms of the provision of a

policy, without an increase of risk, may be deemed merely to suspend and not absolutely to avoid the policy." This rule that an increase or risk absolutely avoids the policy, even though it does not continue up to the time of the loss, applies in principle to a vacancy, because under our decisions vacancy is presumptive proof of increase of risk. *White vs. Insurance Co.*, 85 Me. 97, 26 Atl. 1049; *Jones vs. Insurance Co.*, 90 Me. 44, 37 Atl. 326.

Later Massachusetts decisions follow *Kyte vs. Assurance Co.* rather than *Hinckley vs. Insurance Co.*

In *Wainer vs. Insurance Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598, the vacancy clause was under discussion, the disputed question being whether the policy took effect on January 23, 1889, or on March 13, 1889; it being admitted that the premises were vacant up to April 1, 1889, and occupied from that time to the date of the fire May 12, 1889.

The court unequivocally held that, if the policy had been in force from January 23d, it was rendered void, notwithstanding reoccupancy, but also held that it took effect from March 13th, and therefore the vacancy had not existed for the prohibited and fatal period of thirty days.

Hill vs. Assurance Co., 174 Mass. 542, 55 N. E. 319, involved the material alteration clause, and the fact that the alterations were completed long before the fire was held to have no curative power. "The fact that a breach of condition is past," say the court, "and did not contribute to the loss does not necessarily put an end to the right of the insurer to avoid the policy."

This case was cited with approval in *Stuart vs. Insurance Co.*, 179 Mass. 434, 60 N. E. 929, where the temporary alienation of property was held to avoid the policy notwithstanding reconveyance. It would seem that reoccupancy should have no greater power to rehabilitate the contract than reconveyance.

The court in Massachusetts can therefore be considered as against the doctrine of temporary suspension in a case like the one at bar.

Without prolonging the discussion further, it is sufficient to add that the following cases, all involving the question of vacancy and reoccupancy, hold that the policy is not revived: *Moore vs. Insurance Co.*, 62 N. H. 240, 13 Am. St. Rep. 556; *East Texas Ins Co. vs. Kempner*, 87 Tex. 229, 27 S. W. 122, 47 Am. St. Rep. 99 (1894); *Hardiman vs. Fire Ass'n*, 212 Pa. 383, 61 Atl. 900 (1905); *Hoover vs. Insurance Co.*, 93 Mo. App. 111, 69 S. W. 42 (1902); *Germain Ins. Co. vs. Russell*, 65 Kan. 373, 69 Pac. 345, 58 L. R. A. 234 (1902). See, also, 19 Cyc. p. 709.

[1] These authorities in our opinion rest on the correct principle. It is not a question whether the insurer has been injured by the breach of the contract but whether the contract itself has in fact been broken. It either has or has not been. If not, the

rights of the parties remain unchanged. If it has, then by its own terms the contract is rendered "void." And this word "void," being neither ambiguous nor technical, should be "construed according to the common meaning of the language." R. S. c. 1, § 6, par. 1. It means null, of no effect. The Legislature has seen fit to prescribe this as the form to be used. If a change is desirable or expedient, that change should come by way of Legislature amendment rather than by judicial wrenching. The insurer has the right to insist that the conditions surrounding and affecting the property shall continue and remain the same as at the date of insurance. If "void" means "temporarily suspended," then, under a policy running three years, the premises might become vacant on the next day after its issuance, remain vacant for nearly the entire term, without the assent of the company, but, if reoccupied on the day before the fire, the indemnity would again spring into existence. The contract prescribed by the Legislature clearly forbids any such intermittent rights and liabilities.

[2] We are, of course, not to be understood as holding that the insurer cannot waive this provision of the policy. It is well settled that he can so waive it, but that question needs no discussion here, as there are no sufficient facts to warrant it.

The entry must be: Judgment for defendant.



SUPREME COURT OF NEW YORK.

APPELLATE TERM. FIRST DEPARTMENT.

AMERICAN FIRE INS. CO. OF NEWARK

vs.

MINSKER REALTY CO.*

1. INSURANCE—PREMIUMS—RIGHT TO RECOVER.

Whether the insurer can recover on a policy depends on whether insured authorized its issuance and whether it was thereafter duly issued.

(For other cases, see Insurance, Cent. Dig. § 408; Dec. Dig. § 180.)

2. INSURANCE—DELIVERY OF POLICY.

Delivery of insurance policy to an authorized agent of insured is sufficient delivery to the principal, as regards right to recover the premium.

(For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.)

3. INSURANCE—CANCELLATION—AUTHORITY OF BROKER.

Mere authority of a broker to effect insurance does not authorize him to

* Decision rendered, Dec. 4, 1913. 144 N. Y. Supp. 305.

cancel it, with the effect of making his principal chargeable with the short rate premium.

(For other cases, see *Insurance*, Cent. Dig. §§ 500, 516, 517; Dec. Dig. § 238.)

Appeal from Municipal Court, Borough of Manhattan, First District. Action by the American Fire Insurance Company of Newark against the Minsker Realty Company. From a judgment for defendant, after a trial without a jury, plaintiff appeals. Reversed, and new trial ordered.

Argued October term, 1913, before Seabury, Guy, and Bijur, JJ.

William D. Murray, of New York City, for Appellant.
Leo J. Rosett, of New York City, for Respondent.

BIJUR, J.

The plaintiff sued for the "short rate" premium for the month of November, 1912, on a policy of fire insurance issued at the instance of defendant. Defendant moved to dismiss at the close of plaintiff's case, and renewed the motion at the close of the entire case, on the grounds, first, that the insurance was to cover a permanent loan, and that no such loan was made until November 22d; second, that as no money (premium) was paid, no "short rate" could be recovered; third, as it did not appear that a permanent loan was made, there could be no delivery of a policy.

The case seems to have been tried and decided below on these supposed questions of law, though others are also referred to in the briefs. It is quite apparent that the permanent loan has no relation to the issue in this case. The only questions are whether defendant authorized the issuance of the policy and whether it was thereafter duly issued.

[1-3] The question of authority will have to be decided in face of a conflict of evidence on that point. The admitted delivery of the policy to the agent (if he was agent) was a sufficient delivery to the principal. *Singer vs. Nat. F. I. Co.*, 154 App. Div. 783, 139 N. Y. Supp. 375. In my opinion, however, the plaintiff cannot charge the "short rate" on the theory that the policy was canceled by request of the assured. The authority which it cites to the effect that a broker employed to effect insurance may be regarded as clothed with full authority to cancel it (*Standard Oil Co. vs. Insurance Co.*, 64 N. Y. 85) so holds only in respect to a broker who had general authority to transact all the business of his employer, and this distinction is pointed out in *Hermann vs. Niagara Ins. Co.*, 100 N. Y. 411, 415, 3 N. E. 341, 53 Am. Rep. 197. Indeed, so far as the case at bar is concerned, the very opposite of what plaintiff claims is decided in *Stilwell vs. Mutual Life Ins. Co.*, 72 N. Y. 385.

As the judgment in this case is manifestly based on an erroneous theory of law, it must be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

SUPREME COURT OF NEW YORK.
APPELLATE DIVISION. SECOND DEPARTMENT.

CURNEN

vs.

LAW UNION & ROCK INS. CO., LIMITED.*

1. INSURANCE—CONSTRUCTION OF CONTRACT—DESCRIPTION OF LOCATION.

That through the inadvertence of the insured's brokers a policy on the contents of a building described it as situated at the northeast, instead of the northwest, corner of the intersection of certain streets, did not avoid the insurance, where there was no other building on either of the four corners.

(For other cases, see Insurance, Cent. Dig. § 351; Dec. Dig. § 165.)

2. INSURANCE—CONSTRUCTION OF CONTRACT—DESCRIPTION OF PROPERTY.

It is a rule of construction that, where there is an inaccuracy in the description of the premises in a policy, the erroneous part of the description may be rejected without affecting the policy, if enough remains to identify the premises intended.

(For other cases, see Insurance, Cent. Dig. §§ 339-346; Dec. Dig. § 163.)

3. INSURANCE—CONSTRUCTION OF CONTRACT—DESCRIPTION OF LOCATION.

In an action on a fire policy, evidence *held* to show that the insurer was not harmed by an inadvertent description by the insured's brokers of the dwelling containing the insured property as located on the northeast, instead of the northwest, corner of certain streets.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

4. INSURANCE—PROOF OF LOSS—IMPLIED WAIVER.

The provision of a policy requiring proof of loss within sixty days was waived by the adjuster accepting a schedule of the insured's property and requesting the holding in abeyance of the question of liability, which was not denied until more than sixty days after the loss, and by the retention of proof of loss furnished after the expiration of sixty days.

(For other cases, see Insurance, Cent. Dig. §§ 1382-1390, 1405; Dec. Dig. § 558.)

Appeal from Trial Term, Westchester County.

Action by James F. Curnen against the Law Union & Rock Insurance Company, Limited. From a judgment for plaintiff, the defendant appeals. Affirmed.

Argued before Jenks, P. J., and Burr, Thomas, Stapleton, and Putnam, JJ.

* Decision rendered, Dec. 5, 1913. 144 N. Y. Supp. 499.

Hartwell Cabell, of New York City, for Appellant.
John T. Fenlon, of New York City, for Respondent.

PUTNAM, J.

[1] Plaintiff recovered for a loss of \$1,500 under the defendant's policy. The insurance was on furniture and personal effects "contained in or on the building, additions and extensions thereto, situate northeast cor. of Second street and Wolf's lane, Pelham Heights, New York. Occupied as frame dwelling." Plaintiff for two years previously had carried a \$5,000 policy with the defendant, with the same description, which had been renewed early in 1911. Part of the effects were then removed, so that the plaintiff then surrendered this policy, and his insurance was reduced to \$1,500 by the policy here in suit.

The fire occurred April 7, 1911. It was then found that the premises in which the property was contained were at the northwest corner of Second street and Wolf's lane instead of the northeast corner as described, an inadvertence by plaintiff's brokers when the first policy was obtained. There was no other frame dwelling on the four corners of these intersecting streets. This policy was dated March 29, 1911, and the premium had not been paid. Notice of the loss was given to the defendant's agents by letter of April 7th. The defendant selected an adjuster, and a schedule or inventory of the insured property was accordingly sent to the adjuster by plaintiff's brokers. Before the adjuster inspected the loss, he had been informed by defendant's agents of the error in describing this corner location. On April 17th, plaintiff's brokers paid the premium on this policy, which the defendant's agents retained. The adjuster found that there had been a total loss, the amount of which has not been controverted. He also saw that the location had been misdescribed. Neither the adjuster nor the defendant ever asked for a further proof of loss, beyond the schedule sent by the assured, which the adjuster retained. The effect of naming the wrong street corner was talked over between the adjuster and plaintiff's brokers. The adjuster asked that this question should be held in abeyance to await the arrival from Chicago of Mr. Shaw, defendant's general agent, who in turn submitted the affair to the home office at London. About June 23d (more than sixty days after the loss), a sworn proof of loss was served, which defendant also retained. In July, however, defendant announced that it declined any liability. Some months afterward it suggested dividing the loss with plaintiff's brokers, and sent a check for \$750 as its half; but this proposed compromise was not accepted.

The trial court, sitting without a jury, found that the building on the northwest corner of Second street and Wolf's lane was where the property covered by the policy was intended to be insured. Further, that defendant had waived any misdescription of the insured premises. The court also found that plaintiff had

performed all the policy conditions except service of proof of loss within sixty days after the fire, which had been waived by the defendant.

Upon this appeal defendant urges: (1) That the misdescription of the street corner location was fatal to plaintiff's right to recover; (2) that the payment and receipt of the premium after the loss worked no estoppel; and (3) that defendant did not waive due service of a sworn proof of loss.

[2] There was no other house or building of any kind at this street intersection, either at the date of the last policy or at any previous time. Hence no building other than the one where the insured effects were could have been intended. Such an inaccuracy raises a question of construction: Can the part plainly erroneous be rejected, and yet leave enough to designate the location with certainty?

This rule of construction has frequently been resorted to in aid of clerical misdescriptions of the site of insured buildings or of buildings containing the property to be insured. The rule of rejecting such errors, where sufficient remains to show the place intended, has been applied where the building containing the subject-matter has been described by an inaccurate street number (*Westfield Cigar Co. vs. Insurance Cos.*, 165 Mass. 541, 43 N. E. 504); where a warehouse containing the insured goods was described from the street number in the rear, instead of on the street where it fronted (*Edwards vs. Fireman's Insurance Co.*, 43 Misc. Rep. 354, 87 N. Y. Supp. 507); and where furniture insured was inadvertently written as on the southerly, instead of the northerly, side of a country road (*Le Gendre vs. Scottish Union & Nat. Ins. Co.*, 95 App. Div. 562, 88 N. Y. Supp. 1012). Also, as here, where a street corner was denoted by a wrong compass direction. *Burr vs. Broadway Insurance Co.*, 16 N. Y. 267. This last case raised a further difficulty, as the insured did own two buildings quite similar on the northwest and at the southwest corners of the crossing streets. Yet by eliminating from the policy "No. west," enough was left to make certain the building to which the contract related.

As mistakes in the compass direction of streets, roads, and boundary lines are frequent, this clerical error of the brokers in writing in northeast did not avoid the insurance. Where the absence of any other corner building establishes the intent beyond contradiction, the court rightly held that plaintiff's effects in the only frame building at this street intersection, though at the northwest corner, were intended to be insured.

[3] It was, however, urged at the trial that this inadvertence had harmed defendant, since in reliance thereon it had taken another risk of \$3,500 on this residence, while its own rules for local agents limited such lines to \$3,500. Its book of rules, however, did not indicate that such limitations bound in

any way the general offices, nor does it appear that the limit on the contents of this building had been exceeded. Considering that fire insurance offices have local maps so as to keep track of any cumulative lines (*De Noyelles vs. Delaware Ins. Co.*, 78 Misc. Rep. 649, 138 N. Y. Supp. 855), and that when this \$3,500 insurance on the residence was taken in December, 1910, the defendant already had a larger line on plaintiff's furniture by the prior policy, the duty upon defendant to investigate, and if necessary to reinsure any excess, cannot be set up to avoid liability to plaintiff. As was said of the insurer in *Le Gendre vs. Scottish Union & Nat. Ins. Co.*, *supra*:

"If it did investigate it would have discovered the true location of the plaintiff's residence. Had it done so within a reasonable time, and had there been any basis for claiming it had been misled to its prejudice, it might have rescinded the contract and returned the premiums." 95 App. Div. 566, 88 N. Y. Supp. 1012, 1014.

[4] By defendant's acting on the furniture schedule which plaintiff promptly furnished, and in asking to hold in abeyance the question of liability until it had been referred to London, as well as by finally retaining the sworn proof of loss without objection, it waived the policy requirement of a formal proof of loss within sixty days. Defendant's acceptance of the premium after the loss, and after the adjuster had learned of the mistake in location, with no subsequent offer to return it to the assured, was not consistent with its position that the risk had never attached. *Richards on Insurance*, p. 217.

The trial court therefore rightly directed judgment for plaintiff, which should be affirmed, with costs, and I so advise.



**SUPREME COURT OF NEW YORK.
APPELLATE DIVISION. THIRD DEPARTMENT.**

McARDLE, ET AL.

vs.

ROYAL INS. CO., LIMITED.*

INSURANCE—ACTION ON POLICY—NECESSITY OF REPLICATION.

Where the insurer, by a policy providing that loss, if any, should be payable to the mortgagee as his interest should appear, with subrogation to the rights of the mortgagee, after the commencement of action by the owner, paid the full amount to the mortgagee, and by answer set

* Decision rendered, Nov. 12, 1913. 144 N. Y. Supp. 279.

up, among other things, the fact of such payment as a complete defense which, if established, would bar recovery, it was proper to compel the plaintiff to reply thereto.

(For other cases, see Insurance, Cent. Dig. §§ 1554, 1626, 1628, 1629; Dec. Dig. § 641.)

Appeal from Special Term, Albany County.

Action by Mary A. McArdle and others against the Royal Insurance Company, Limited. From an order denying defendant's motion to compel plaintiffs to reply to the first defense contained in its answer, defendant appeals. Reversed.

Argued before Smith P. J., and Kellogg, Lyon, Howard, and Woodward, JJ.

Cardoza & Nathan, of New York City (Edgar J. Nathan and Raymond Reubenstein, both of New York City, of counsel), for Appellant.

John F. O'Brien, of Albany (William E. Woppard, of Albany, of counsel), for Respondents.

HOWARD, J.

The plaintiffs own property in the city of Albany, and on June 7, 1912, the date of the fire, they carried insurance with the defendant. In the policy was the usual provision that loss, if any, be payable to the mortgagee as its interest should appear with privilege to the insurance company of being subrogated to the rights of the mortgagee. After the fire, proofs of loss were duly presented to the defendant; but the defendant did not pay the claim. On January 7, 1913, the plaintiffs began this action on the policy. On January 8th the defendant paid the full amount of the policy to the mortgagee. The defendant answered the complaint, denying material allegations therein, and setting up as a defense the fact of this payment; also the defense of arson. A motion was made by the defendant to compel the plaintiffs to reply to the defense of payment. The motion was denied, and an appeal brings the matter to us.

The defense seems to be complete on its face. The policy imposed upon the insurance company the duty to pay the loss in case of fire to the mortgagee. The defendant alleges in its answer that it has done this. If this be so, there can be no further recovery—no recovery at all by the plaintiffs. If the plaintiffs have any way of meeting this apparently perfect defense, they should be compelled to disclose it by a reply. By so doing it clarifies and simplifies the issues, and narrows the trial down to its smallest possible limits. If there be no way open to the plaintiffs to overcome this defense, a reply, or a failure to reply in case no reply be made, puts the defendant in position to move for judgment on the pleading. It is well that the issues be distinctly defined before a trial begins. The court should know, and everybody concerned, as far as may be, should know, what issues are to be tried, when the litigants enter the courtroom. This saves time; this prevents surprise; this promotes justice.

The order appealed from should be reversed, with costs. All concur.

COURT OF ERRORS AND APPEALS OF NEW JERSEY.**FRITZ***vs.***PENNSYLVANIA FIRE INS. CO.*****1. INSURANCE—NOTICE OF CANCELLATION—FORM AND SUFFICIENCY.**

An insurance policy contained the following clause: "This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation." A written notice of cancellation given under the clause examined, and held to be sufficient in form.

(For other cases, see Insurance, Cent. Dig. §§ 500-503; Dec. Dig. § 229.)

2. INSURANCE—NOTICE OF CANCELLATION—WHAT CONSTITUTES.

Notice of cancellation of an insurance policy inclosed in a postpaid registered envelope, addressed to the insured, and received and unopened by him, bearing upon its face the card of an insurance company other than the one in which the insured held a policy, although having upon it the name of the same agents as those of the company in which he was insured, was not, in and of itself, notice of cancellation.

(For other cases, see Insurance, Cent. Dig. §§ 500-503; Dec. Dig. § 229.)

3. INSURANCE—NOTICE OF CANCELLATION—WHAT CONSTITUTES.

Assuming, without conceding, that if the envelope had contained the card of the company in which he was insured, the addressee, upon its receipt, would have been put upon inquiry, so that he would have refrained from opening the envelope only at the peril of being charged with knowledge of its contents, nevertheless, as it appeared upon its face to be a communication from a concern with which he had no business, he was not obliged to open it, and, in the absence of actual knowledge of its contents, was not bound by the notice which it contained.

(For other cases, see Insurance, Cent. Dig. §§ 500-503; Dec. Dig. § 229.)

Swayze, Parker, Voorhees, Congdon, and Heppenheimer, JJ., dissent.

Appeal from Supreme Court.

Action by William Fritz against the Pennsylvania Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

William K. Flanagan, of Newark (Lindabury, Depue & Faulks, of Newark, on the brief), for Appellant.

Thomas P. Fay, of Long Branch, for Respondent.

WALKER, Ch.

This was an action upon a policy of insurance issued by the

* Decision rendered, Nov. 17, 1913. 88 Atl. Rep. 1065. Syllabus by the Court.

defendant company to the plaintiff October 21, 1909, covering a frame building occupied as a barn at Long Branch, running for the term of three years from November 15, 1909. It was actually delivered to the plaintiff by the company's agent on October 21, 1909. On May 11, 1911, the building covered by the policy was destroyed by fire, which occasioned a total loss. The plaintiff gave notice to the insurance company by letter the next day, and on the following day received from the company's agent a letter acknowledging the receipt of his (plaintiff's) letter, notifying it of the fire, and stating that it did not carry any insurance on his stable. The plaintiff afterwards sent the company the usual proofs of loss.

The one question argued upon this appeal was as to whether or not the policy had been canceled before the fire, and that, in turn, involved the question whether the plaintiff had received from the company a *notice* of cancellation. The facts were these: On December 22, 1909, the defendant caused to be mailed a notice of the cancellation of the policy in a postpaid registered envelope addressed to the plaintiff. It was received by the plaintiff on December 24, 1909, and receipted for by him. The envelope in which it was contained had upon it the card of the "Springfield Fire & Marine Insurance Company of Massachusetts. Emanuel & Co., Agents, Post Office Building, Long Branch, N. J." This gave no hint or token to Mr. Fritz that the letter contained anything of interest to him. It would have been somewhat different at least had the envelope contained the card of the "Pennsylvania Fire Insurance Company of Philadelphia," the company in which he held a policy. Emanuel & Co. were agents for both concerns. Had the envelope contained the card of the company in which Mr. Fritz was insured he would quite naturally have concluded that the contents of the envelope bore some relation to his policy, and it may well be that that fact would have put him upon inquiry, so that he would have refrained from opening the envelope only at the peril of being charged with knowledge of its contents, but, on the contrary, he may well have concluded that the envelope which he received contained a solicitation for further or other insurance in another company, and, like many another man, might have refrained from opening, or have destroyed, the missive, thinking it to be some soliciting or advertising scheme in which he was not interested. The letter in question, with two others, was received by the plaintiff at his butcher shop, and carried home by him and laid upon the ice chest unopened, and was afterwards thrown in an unused ice chest with other papers where it remained until after the fire, when the plaintiff's daughter discovered it and the plaintiff opened it and read the notice from the insurance company.

[1] The policy contained a clause authorizing cancellation; so much of which as is pertinent, reads as follows: "This policy

shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation." The notice of cancellation mailed to the plaintiff started out by saying that the company through its agent "herewith gives five days' formal notice of its intention to cancel" the policy, shortly describing it, and follows that with the assertion that liability will absolutely cease at noon December 28, 1909. The point is made that the plaintiff did not receive five days' notice of cancellation, because the notice although dated six days before the date mentioned for taking effect, was only received by the plaintiff on December 24th, or four days previous; that is, the envelope containing it was then received. The notice was sufficient in form. Like the notice in *Van Valkenburgh vs. Lenox*, 51 N. Y. 465, referred to in the opinion of Mr. Justice Depue in *Lattan vs. Royal Ins. Co.*, 45 N. J. Law, 453, at page 458, it was somewhat equivocal in its terms, but like that in the latter case (*Lattan vs. Royal Ins. Co.*) was unequivocal in its import. It stated that cancellation would take place on a certain date, and, while cancellation might not have gone into effect that day, by reason of belated notice, nevertheless, it would become effective five days after actual notice received by the plaintiff, for it informed him in plain terms that the company gave five days' formal notice of its intention to cancel the policy. If, therefore, the notice was served less than five days before the date mentioned, it became efficacious in five days after service; that is, after notice brought home to the plaintiff. As was said by this court in *Davidson vs. German Insurance Co.*, 74 N. J. Law, 487, at page 491, 65 Atl. 996, at page 997 (13 L. R. A. [N. S.] 884, 12 Ann. Cas. 1065): "The notice is not required to be in writing. It may be verbal or oral. No particular form of notice is prescribed. It is only necessary that the company positively, distinctly, and unequivocally indicate to the insured that it is its intention that the policy shall cease to be binding as such upon the expiration of five days from the time when this intention is made known to the insured. And it does not matter whether this information is conveyed by the use of the words, 'Your policy will be canceled in five days,' or, 'Your policy is already canceled.'"

[2, 3] The question, therefore, reduces itself to the single one of notice or no notice.

In *Hand vs. Howell*, 61 N. J. Law, 142, at page 146, 38 Atl. 748, at page 749, the question was one of notice to a sheriff who had levied upon chattels, that rent was due for the premises on which they were taken in execution. Notice was said to have been given in a letter addressed and mailed to the sheriff. Said Mr. Justice Collins, speaking for the Supreme Court: "Oral declarations made to one sought to be charged thereby may in some cases be considered as admitted by silence, but the rule is otherwise as to letters. The recipient is not called on to reply, or be considered as admitting what is written. The following decisions

are in point, and we have been referred to no case holding otherwise: *Fairlie vs. Denton*, 3 Car. & P. 103; *Richard vs. Frankum*, 9 Car. & P. 221; *Draper vs. Crofts*, 15 Mees. & W. 166; *Gaskill vs. Skene*, 14 Q. B. 664; *Canadian Bank vs. Coumbe*, 47 Mich. 358, 365 [11 N. W. 196]; *Bank of British North America vs. Delafield*, 126 N. Y. 410 [27 N. E. 797,] and earlier New York cases therein cited; *Hill vs. Pratt*, 29 Vt. 119. An unanswered letter, not received in the course of a correspondence, is not evidence at all against the recipient, except to prove notice or demand." This case (*Hand vs. Howell*) was affirmed in this court for the reasons given by the Supreme Court in its opinion. *Hand vs. Howell*, 61 N. J. Law, 694, 38 Atl. 748.

It is here argued that as the notice was actually received by the plaintiff in the envelope addressed to him he had notice, although he did not open the envelope. We do not so consider. True, what was said in *Hand vs. Howell* was the equivalent of this: "An unanswered letter is not evidence at all against the recipient except to prove notice or demand." But that observation must be read in connection with what precedes it, namely, a holding that the recipient is not called on to reply to or be considered as admitting what is written to him. An examination of the cases referred to in *Hand vs. Howell* will show that the letters in controversy in those causes were received and examined by the recipients, or presumably so, for lack of controversy on that point. One case concerned the nonanswering of certain affidavits made against the party. Now, in all of these cases where there was a notice given or demand made upon the party, or both, the holding was that the letters (having been received and examined, as stated) were competent evidence of notice or demand in the particular case, but that the rest of the matters contained in the letters were not evidence in favor of the parties writing them.

In the case at bar the stipulation in the policy was that the insurer could cancel it by giving five days' notice to the insured, without any provision for constructive notice. Notice, therefore, to be efficacious to cancel the policy, must have been brought home to the insured—that is, brought to his personal attention—or, at least such a situation must have been brought about as to have put the insured upon inquiry, which, had it been made, admittedly would have resulted in actual notice to him.

As the record before us discloses neither actual notice, nor such circumstances as reasonably tended to put the plaintiff on inquiry which would have led to notice, the judgment of the court below must be affirmed.

Swayze, Parker, Voorhees, Congdon, and Heppenheimer, JJ., dissenting.

COFFMAN vs. LOUISVILLE & N. R. CO.*

(Supreme Court of Alabama.)

1. INSURANCE—FIRE INSURANCE—SUBROGATION.

An insurer may, upon paying a fire loss, sue the person negligently causing the fire in the name of insured for the resulting damages, and retain from the amount recovered the sum paid to insured, and turn the balance over to him, or insured may himself sue the wrongdoer for his own benefit and that of the insurer.

(For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.)

2. CHAMPERTY AND MAINTENANCE—CONTRACTS INDEMNIFYING COSTS.

Whether an insured, suing for himself and the insurer for damages for destruction of his property by fire, is indemnified by the insurer as to the costs of the litigation is immaterial to the person sued; the doctrine of maintenance not being applicable to such an indemnity contract.

(For other cases, see Champerty and Maintenance, Cent. Dig. §§ 4, 9, 11-19; Dec. Dig. § 4.)

3. RAILROADS—FIRE INSURANCE—ACTIONS—ADMISSION OF EVIDENCE.

In an action by a property owner for himself and for an insurance company to recover damages from a railroad company for the destruction of property by fire, a subrogation agreement executed between the owner and the insurance company, transferring to the latter the owner's right of action to the extent of the amount insured, was irrelevant.

(For other cases, see Railroads, Cent. Dig. §§ 1717-1729; Dec. Dig. § 481.)

4. RAILROADS—FIRE INSURANCE—ACTIONS—ADMISSION OF EVIDENCE—INDEMNITY AGREEMENT.

In an action by the owner for himself and the insurance company against the railroad company for the negligent destruction of the property by fire, an agreement between the owner and insurance company, by which the latter agreed to indemnify the owner for costs and expenses incurred, was irrelevant and inadmissible.

(For other cases, see Railroads, Cent. Dig. §§ 1717-1729; Dec. Dig. § 481.)

5. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The error in admitting such indemnity agreement in evidence was prejudicial to plaintiff, tending to lead the jury to believe that plaintiff had so little faith in his case that he required an indemnity bond for costs before he would sue.

(For other cases see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.)

6. RAILROADS—FIRES—ACTIONS—JURY QUESTION—NEGIGENCE.

If there is evidence that a locomotive emitted live sparks of unusual size or number on a particular occasion, or threw live sparks to an unusual

* Decision rendered, Nov. 13, 1913. 63 S. Rep. 527.

distance, it is a question for the jury whether the locomotive was properly handled and properly constructed and equipped.

(For other cases, see Railroads, Cent. Dig. §§ 1740-1746; Dec. Dig. § 484.)

7. RAILROADS—FIRES—ACTIONS—PROOF OF NEGLIGENCE.

Proof that a fire was caused by a locomotive in the control of a railroad company's employees, acting in the scope of their employment, makes out a *prima facie* case of the negligence against the railroad company, either in the improper management of the locomotive or its improper construction and equipment, and shifts the burden upon the company to show that its employees properly handled the locomotive, and that it was properly constructed and equipped.

(For other cases, see Railroads, Cent. Dig. §§ 1730-1732, 1734-1736; Dec. Dig. § 482.)

8. APPEAL AND ERROR—HARMLESS ERROR—INSTRUCTIONS.

Error, in an instruction in an action against a railroad company for damages from fire, in placing the burden on plaintiff of showing that the locomotive was improperly handled or constructed when the property was fired by sparks from it was prejudicial to plaintiff and reversible.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.)

Appeal from Circuit Court, Limestone County; D. W. Speake, Judge.

Action by Lawrence D. Coffman, individually and for the use of the American Home Fire Insurance Company, against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

James G. Rankin and W. R. Walker, both of Athens, for Appellant.
Sanders & Thach, of Athens, for Appellee.



OHIO FARMERS' INS. CO. vs. GEDDES. (No. 8,110.).

(Appellate Court of Indiana, Division No. 1.)

APPEAL AND ERROR—BRIEFS—REQUISITES AND SUFFICIENCY.

Under rule 22 of the Supreme and Appellate Courts (55 N. E. v), requiring appellant's brief to contain a concise statement of so much of the record as fully presents every error and exception relied on, on an appeal on which it was assigned that the court erred in sustaining a demurrer to a plea in abatement, in overruling a demurrer to the amended complaint, and in its conclusions of law, where appellant's brief contained neither the amended complaint, the demurrer thereto, the demurrer to the plea, the special findings, the conclusions of law, the motion for a new trial, nor the substance thereof, and did not sufficiently set out the substance of the plea, no question was properly presented.

(For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.)

*Decision rendered, Nov. 26, 1913. 103 N. E. Rep. 349.

Appeal from Circuit Court, Allen County; Owen Heaton, Judge.
Action by George Geddes against the Ohio Farmers' Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Robert B. Driebelbiss, of Ft. Wayne, Lee Elliott, of Seville, Ohio, and H. I. Smith, of Ft. Wayne, for Appellant.
Henry G. Hogan and Guy Coleric, both of Ft. Wayne, for Appellee.

RUSSELL vs. PALENTINE INS. CO. (No. 16,198).*

(Supreme Court of Mississippi.)

1. PRINCIPAL AND AGENT—EVIDENCE.

The fact of agency may be assumed from the natural improbability that one should without authority assume to act for another for a considerable length of time and from the fact that such conduct would naturally become known by the purported principal.

(For other cases, see Principal and Agent, Cent. Dig. § 36; Dec. Dig. § 19.)

2. MALICIOUS PROSECUTION—AUTHORITY TO PROSECUTE.

While one who was employed by an insurance company to collect from plaintiff, a former agent, a balance due the company was authorized to employ all appropriate means to collect such amount, he was not authorized to institute an embezzlement prosecution against plaintiff for that purpose, so that the company would not be liable in malicious prosecution if he did so.

(For other cases, see Malicious Prosecution, Cent. Dig. §§ 83-86; Dec. Dig. § 42.)

Appeal from Circuit Court, Warren County; H. C. Mounger, Judge.
Action by A. G. Russell against the Palentine Insurance Company and another. From a judgment for defendant named, plaintiff appeals. Affirmed.

J. C. Bryson, Anderson, Vollor & Kelly, and Hirsh, Dent & Landau, all of Vicksburg, for Appellant.
McLaurin, Armistead & Brien, of Vicksburg, for Appellee.

* Decision rendered, Dec. 15, 1913. 63 S. Rep. 644.

**GLOBE & RUTGERS FIRE INS. CO. vs. CHICAGO & A.
R. CO.***

(*Kansas City Court of Appeals. Missouri.*)

**1. INSURANCE—FIRE INSURANCE—ACTION BY COMPANY—
MEASURE OF DAMAGES.**

Since a railroad company was not a party or privy to a contract of insurance taken out by the owner of the property along the right of way, its liability to the owner or the insurance company, when subrogated to his right, would not be affected by such contract, and hence the measure of the railroad company's liability to the subrogated insurance company was the actual value of the property destroyed at the time of the fire, and not its insured value.

(For other cases, see *Insurance*, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.)

**2. EVIDENCE—FIRE INSURANCE—ACTIONS—ADMISSION OF
EVIDENCE—VALUE OF PROPERTY.**

In an action by a fire insurance company, subrogated to the owner's rights, against a railroad company for damages for the destruction of adjacent property by fire from an engine, evidence was admissible, on the question of the value of the houses destroyed, as to what the owner had sold similar houses for.

(For other cases, see *Evidence*, Cent. Dig. §§ 416-423; Dec. Dig. § 142.)

3. DAMAGES—INSTRUCTIONS—REASONABLE VALUE.

The use of the term "reasonable value," in instructions on the issue of the market value of property destroyed by fire, was not reversible error; the term having a well-known meaning to the common understanding and being of common use in judicial proceedings.

(For other cases, see *Damages*, Cent. Dig. §§ 556-559; Dec. Dig. § 217.)

4. TRIAL—ARGUMENT—CONFORMITY TO EVIDENCE.

Where, in an action by a fire insurance company, subrogated to the owner's rights, against a railroad company for the destruction of the insured property by fire, the insurance company claimed that the houses were insured at their reasonable value, while the railroad's evidence showed that they were insured at seven times their real value, argument of defendant's counsel "that there was a nigger in the woodpile," explained by stating that, in view of the gross overinsurance and the prompt settlement of the loss by the insurance company, there must have been some close relationship between the officers of the insurance company and the owner of the property, was justified, though the issue of fraudulent overinsurance was not raised.

(For other cases, see *Trial*, Cent. Dig. §§ 294-298, 300; Dec. Dig. § 121.)

5. COSTS—OFFER OF COMPROMISE—EFFECT.

Under Rev. St. 1909, § 1965, providing that, if plaintiff fail to obtain a more favorable judgment than the amount for which defendant offered to allow judgment to be taken against him, plaintiff shall pay defendant's costs from the time of the offer, defendant was entitled to have costs taxed against plaintiff which were incurred after defendant's offer to allow judgment against it for \$400 and costs, where the judgment for plaintiff was only for \$375.

(For other cases, see *Costs*, Cent. Dig. §§ 137-164; Dec. Dig. § 42.)

* Decision rendered, Nov. 17, 1913. 160 S. W. Rep. 907.

Appeal from Circuit Court, Randolph County; A. H. Waller, Judge.
 Action by the Globe & Rutgers Fire Insurance Company against the Chicago & Alton Railroad Company. From a judgment for plaintiff for a less amount than it claimed, it appeals. Affirmed.

Clarence A. Barnes, of Mexico, Mo., and Barger & Hick, of Chicago, Ill., for Appellant.
 W. P. Pinkerton and Scarritt, Scarritt, Jones & Miller, all of Kansas City, for Respondent.

DIXIE FIRE INS. CO. *vs.* A. LAYNE & BRO.*

(Court of Appeals of Kentucky.)

INSURANCE—CANCELLATION OF POLICY—CONSENT—PRINCIPAL AND AGENT.

Where in an action on a fire insurance policy the defense was that the policy had been canceled by notice accepted by the insured's agent, and there was no evidence that the agent had any authority other than to procure the policy, which was delivered to him unconditionally, a peremptory instruction was properly given for the plaintiff firm; the fact that insured's agent has authority to procure an insurance policy, which is delivered to him unconditionally, creating no presumption that the agent has authority to accept notice of cancellation. (For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

Appeal from Circuit Court Floyd County.

Action by A. Layne & Bro. against the Dixie Fire Insurance Company. From judgment for plaintiffs, defendant appeals. Affirmed.

Harkins & Harkins, of Prestonsburg, for Appellant.

S. C. Ferguson, of Prestonsburg, and C. B. Wheeler, of Ashland, for Appellees.

* Decision rendered, Dec. 19, 1913. 161 S. W. Rep. 530.

CONDON *vs.* EXTON-HALL BROKERAGE & VESSEL AGENCY.*

(Supreme Court of New York, Appellate Term, First Department.)

INSURANCE—CANCELLATION OF POLICY—FAILURE TO CANCEL—LIABILITY OF AGENT.

Where defendant's only connection with a fire policy was to apply for it for the owner to plaintiff's assignor, and defendant was afterwards

* Decision rendered, Dec. 16, 1913. 144 N. Y. Supp. 760.

requested by such assignor's general agent to have the policy canceled, which defendant proceeded to do, it was not liable to plaintiff in damages for failure to have it promptly canceled; defendant not being the agent of plaintiff's assignor or the agent of the insured for the purpose of receiving notice of cancellation, and not in fact being bound to do even what it did.

(For other cases, see Insurance, Cent. Dig. §§ 107-110, Dec. Dig. § 83.)

Appeal from City Court of New York, Trial Term.

Action by John T. Condon against the Exton-Hall Brokerage & Vessel Agency. From a judgment of the City Court for plaintiff (142 N. Y. Supp. 548), defendant appeals. Reversed, and complaint dismissed.

Argued October Term, 1913, before Seabury, Guy, and Bijur, JJ.

Coudert Bros., of New York City, for Appellant.

Carmody & Carswell, of New York City (Francis X. Carmody, of New York City, of Counsel), for Respondent.



McCLURE vs. MUTUAL FIRE INS. CO. OF CHESTER Co.*

(Supreme Court of Pennsylvania.)

1. APPEAL AND ERROR—VERDICT—CONCLUSIVENESS.

Where, in an action on a fire insurance policy the defense was that plaintiff had increased the hazard by a change of business in violation of the policy a verdict for plaintiff was conclusive on such question.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3921, 3923, 3924; Dec. Dig. § 999.)

2. INSURANCE—POLICY—SUSPENSION AND RENEWAL—VIOLATION OF CONDITIONS.

Where insured keeps a prohibited article on the insured's premises, but the insurer does not cancel the policy therefor, and the keeping of the article is discontinued prior to the fire, and premiums are paid and renewal receipts are issued after such discontinuance, the insured may recover; the policy being merely suspended during the time the prohibited article is kept on the premises.

(For other cases, see Insurance, Cent. Dig. §§ 1041-1056, 1058-1070; Dec. Dig. § 392.)

3. INSURANCE—POLICY—CONSTRUCTION—WRITTEN AND PRINTED PORTIONS.

The general rule that written portions of an insurance policy will prevail over printed portions, if there is any conflict between them, applies to a provision prohibiting the keeping of certain articles on the premises; and hence the use of an article prohibited by a printed clause will not avoid the policy, where such article is customarily a part of the goods insured or is in customary use in the business conducted in the insured building.

(For other cases, see Insurance, Cent. Dig. §§ 782-791; Dec. Dig. § 326.)

* Decision rendered, June 27, 1913. 88 Atl. Rep. 921.

4. INSURANCE—POLICY—CONSTRUCTION.

That a small amount of gasoline has been kept in the insured building in violation of the policy, to be used in connection with the business conducted therein, will not bar recovery on the policy, where such gasoline had nothing to do with the fire.

(For other cases, see Insurance, Cent. Dig. §§ 782-791; Dec. Dig. § 326.)

Appeal from Court of Common Pleas, Lancaster County.

Action by Lillie McClure against the Mutual Fire Insurance Company of Chester County. From judgment for defendant n. o. v., plaintiff appeals. Reversed.

Argued before Fell, C. J., and Brown, Mestrezat, Potter, Elkin, Stewart, and Moschzisker, JJ.

W. U. Hensel, of Lancaster, for Appellant.

John E. Malone, of Lancaster, and Gheen & Parke, for Appellee.



MONTGOMERY ET AL. vs. SOUTHERN MUT. INS. CO.*

(Supreme Court of Pennsylvania.)

I. INSURANCE—POLICY—CONSTRUCTION—EXEMPTION.

Words of exemption contained in a fire insurance policy will be construed most strongly in insured's favor so as to give them reasonable effect, and not, unless imperatively necessary, to defeat the indemnity.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

2. INSURANCE — POLICY — CONSTRUCTION — EXEMPTION — FIRE FROM LOCOMOTIVE.

Under a fire insurance policy exempting the insurer from loss by fire occasioned by locomotives, the insurer was liable for the destruction of buildings from fire communicated from a building on the right of way, though such building was set on fire by sparks from a locomotive; the exempting clause contemplating a fire directly caused by sparks from a locomotive.

(For other cases, see Insurance, Cent. Dig. §§ 1126, 1133, 1134, 1136, 1140-1143; Dec. Dig. § 421.)

Appeal from Court of Common Pleas, Lancaster County.

Actions by Isaac Montgomery and others against the Southern Mutual Insurance Company, etc. From a judgment for defendant n. o. v., plaintiffs appeal. Reversed.

Argued before Brown, Mestrezat, Potter, Elkin, and Moschzisker, JJ.

William H. Keller and John A. Coyle, both of Lancaster, for Appellant.

John E. Malone and John A. Nauman, both of Lancaster, for Appellee.

* Decision rendered, June 27, 1913. 88 Atl. Rep. 924.

COMMONWEALTH EX REL. TODD, ATTY. GEN., VS. PHILADELPHIA CONTRIBUTIONSHIP.*

(Supreme Court of Pennsylvania.)

1. INSURANCE — MUTUAL INSURANCE CORPORATION — AMENDMENT TO DEED OF SETTLEMENT—CANCELLATION OF POLICIES.

Certain persons formed an unincorporated society for mutual fire insurance by subscribing to a deed of settlement which declared the purpose of the society to be to provide insurance apart from all views of private gain and provided that the members should be equal sharers in the gains and losses. Subsequently the society was incorporated by legislative act reciting the same purpose and empowering the members to make regulations to carry out the purposes of the society. *Held*, that the society had power to adopt an amendment to the deed of settlement authorizing the cancellation of any insurance policy upon the return of the deposit money alone without return of a proportionate share of the accumulated profits.

(For other cases, see Insurance, Cent. Dig. §§ 498, 499; Dec. Dig. § 228.)

2. INSURANCE—CANCELLATION OF POLICY—DISCRETION.

Whether a risk assumed by a mutual insurance company should be canceled for the best interest of all other policyholders upon terms that are not unjust is a question which should be left to the insurer's determination.

(For other cases, see Insurance, Cent. Dig. § 55; Dec. Dig. § 233.)

Appeal from Court of Common Pleas, Dauphin County.

Quo warranto by the Commonwealth, on the relation of M. Hampton Todd, Attorney General, against the Philadelphia Contributionship for the Insurance of Houses from Loss by Fire. From judgment for defendant, plaintiff appeals. Affirmed.

Argued before Fell, C. J., and Brown, Mestrezat, Potter, and Elkin, JJ.

R. Mason Lisle, for Appellant.

John G. Johnson and W. W. Montgomery, both of Philadelphia, for Appellee.

* Decision rendered, June 27, 1913. 88 Atl. Rep. 929.

COMMONWEALTH vs. PHILADELPHIA MANUFACTURERS' MUT. FIRE INS. CO.*

(Supreme Court of Pennsylvania.)

TAXATION—FIRE INSURANCE COMPANIES—"RESERVE."

Under Act June 1, 1889 (P. L. 420), as supplemented by Act June 28, 1895 (P. L. 408), imposing a tax on insurance business and exempting mutual companies doing business without an accumulated reserve, a balance on hand at the close of the year, when accumulated by a mutual fire insurance company from contributions made by stockholders at the beginning of the policy year for the payment of losses and expenses during the year, being the property of the members who had contributed to it was not a "reserve" within the meaning of such statute, and hence was not subject to taxation.

(For other cases, see Taxation, Cent. Dig. § 370; Dec. Dig. § 230.)

(For other definitions, see Words and Phrases, vol. 7, pp. 6144-6146.)

Appeal from Court of Common Pleas, Dauphin County.

Action by the Commonwealth against the Philadelphia Manufacturers' Mutual Fire Insurance Company. From judgment for defendant, plaintiff appeals. Affirmed.

William M. Hargest, Asst. Deputy Atty. Gen., and John C. Bell, Atty. Gen., for Appellant.

A. C. Stamm and M. E. Olmsted, both of Harrisburg, for Appellee.

* Decision rendered, June 27, 1913. 88 Atl. Rep. 943.

WETMORE vs. McELROY.*

(Supreme Court of South Carolina.)

INSURANCE—FIRE INSURANCE—MUTUAL COMPANIES—ASSESSMENTS.

In an action by the receiver of an insolvent assessment fire insurance company to recover assessments from an alleged member, held, that the member who paid three times the regular premium on condition that he would be guaranteed from assessments was not liable.

By divided court; Hydrick and Fraser, JJ., dissenting.

(For other cases, see Insurance, Cent. Dig. §§ 417-426; Dec. Dig. § 192.)

Appeal from Common Pleas Circuit Court of Spartanburg County; F. B. Garry, Judge.

Action by S. H. Wetmore, as receiver of the Carolina Mutual Fire Insurance Company, against J. D. McElroy. From a judgment for defendant, plaintiff appeals. Affirmed.

J. W. Nash, of Spartanburg, for Wetmore, Receiver.

B. H. Brown, of Spartanburg, and Paget & Watkins, of Anderson, for Respondent.

* Decision rendered, Dec. 5, 1913. 80 S. E. Rep. 266.

AUSTIN FIRE INS. CO. vs. BROWN.*

(Court of Civil Appeals of Texas. Amarillo.)

1. INSURANCE—PRELIMINARY ORAL CONTRACT—VALIDITY.

A preliminary oral contract of insurance will bind the insurer.

(For other cases, see Insurance, Cent. Dig. §§ 203-209; Dec. Dig. § 131.)

2. INSURANCE — CONTRACT — VALIDITY — OWNERSHIP OF PROPERTY.

That persons other than the party to a preliminary oral contract of insurance owned interests in the property insured did not invalidate the contract where the insurer's agent knew the facts in relation to the ownership and that the contract was for the benefit of all the owners.

(For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. § 378.)

3. PRINCIPAL AND AGENT—CONTRACT—AUTHORITY OF SUB-AGENT.

A person authorized by an agent of a fire insurance company to represent him in negotiations for insurance has the same power to bind the insurance company to a contract of insurance as has the agent.

(For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. § 378.)
§ 54.)**4. APPEAL AND ERROR—PRESENTATION FOR REVIEW—STATEMENT OF FACTS.**

Plaintiff in error's objection that he did not obtain a fair statement of facts could not be considered when presented by a bill of exceptions which was refused by the trial court.

(For other cases, see Appeal and Error, Cent. Dig. §§ 2530-2545; Dec. Dig. § 569.)

5. APPEAL AND ERROR—STATEMENT OF FACTS—DUPLICATE.

A statement of facts prepared by the trial judge, upon a disagreement between counsel in reference thereto, need not be prepared in duplicate but need only be filed with the clerk of the court, where the case was tried, as part of the record of the cause.

(For other cases, see Appeal and Error, Cent. Dig. §§ 2560, 2562-2564, 2566; Dec. Dig. § 573.)

6. INSURANCE—LIABILITY OF INSURER—PRELIMINARY ORAL CONTRACT.

Where a complete preliminary oral contract of insurance was entered into and the company ordered the cancellation of a policy issued thereon the day before the fire occurred, and such policy was never delivered or attempted to be delivered to the insured, and liability was denied by the company, the oral contract was determinative of the company's liability.

(For other cases, see Insurance, Cent. Dig. §§ 203-209; Dec. Dig. § 131.)

Error from Cottle County Court; W. E. Prescott, Judge.

* Decision rendered, Nov. 8, 1913. Rehearing denied, Nov. 29, 1913. 160
S. W. Rep. 973.

Action by C. L. Brown against the Austin Fire Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed. See, also, 147 S. W. 680.

Wm. Thompson and Will C. Thompson, both of Dallas, for Plaintiff in Error.
R. D. Browne, of Paducah, for Defendant in Error.



NATIONAL UNION FIRE INS. CO. *vs.* AKIN.*

(Court of Civil Appeals of Texas. El Paso.)

1. INSURANCE—CANCELLATION OF POLICY—EFFECT OF DIRECTION.

Where insured directed the cancellation of a policy containing the usual cancellation clause, and the agents, instead of cancelling it, wrote him concerning the reason why they were obliged to charge an increased premium, and stated that the policy would be canceled if he would send it to them, but not otherwise, it cannot be held, as a matter of law, that insured's letter operated as a cancellation without action on the part of the insurer.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

2. INSURANCE—ACTIONS—POLICIES.

In an action on an insurance policy, where the defense was cancellation, the finding of the court that the minds of the parties had not met on cancellation *held* supported by the evidence.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

Appeal from District Court, Harris County; Chas. E. Ashe, Judge. Action by Henry R. Akin against the National Union Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

L. B. Moody, of Houston, for Appellant.
Andrews, Ball & Streetman, of Houston, for Appellee.

* Decision rendered, Nov. 6, 1913. Rehearing denied, Nov. 26, 1913. 160
S. W. Rep. 669.

DELAWARE INS. CO. vs. WALLACE.*

(Court of Civil Appeals of Texas. Dallas.)

1. INSURANCE—FIRE INSURANCE—CHANGE OF LOCATION OF PROPERTY.

When insured property is removed from the location specified in the policy, without the knowledge or consent of the insurer, the insured cannot ordinarily recover; but there may be a waiver of the provision, limiting the liability to such location, or the insurer may be estopped to set it up.

(For other cases, see Insurance, Cent. Dig. § 941; Dec. Dig. § 372.)

2. EVIDENCE—ADMISSIBILITY—TELEPHONIC CONVERSATION.

In an action against a fire company, where the defense was that the goods had been removed from the location specified in the policy and the insured claimed that the insurer's agent agreed to change the policy to cover the new location, evidence of a telephonic request upon the agents of the insurer to change the location specified in the policy, and their agreement to do so, is admissible where the facts and circumstances were sufficient to warrant a finding that the communication was in fact between insured and the agents of insurer.

(For other cases, see Evidence, Cent. Dig. § 438; Dec. Dig. § 148.)

3. INSURANCE—FIRE INSURANCE—DEFENSE.

In an action on a fire policy, where the defense was that the goods had been taken from the location specified in the policy, the insured, upon showing the insurer's agent agreed to his request to change the policy so as to cover the place where the loss occurred, is entitled to recover, even though no change had actually been made on the policy, and though the policy provided that none of its provisions could be waived unless in writing upon or attached to the policy.

(For other cases, see Insurance, Cent. Dig. § 1024; Dec. Dig. § 386.)

4. INSURANCE—FIRE POLICIES—CONSTRUCTION.

An insurance policy upon household and kitchen furniture which was to run for three years includes furniture acquired subsequent to the issuance of the policy.

(For other cases, see Insurance, Cent. Dig. §§ 339-346; Dec. Dig. § 163.)

Error from Dallas County Court; W. F. Whitehurst, Judge.

Action by Carl Wallace against the Delaware Insurance Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Wm. Thompson and Will C. Thompson, both of Dallas, for Appellant.
Meador & Davis, of Dallas, for Defendant in Error.

* Decision rendered, Nov. 8, 1913. Rehearing denied, No. 29, 1913.
160 S. W. Rep. 1130.

POLEMANAKOS vs. AUSTIN FIRE INS. CO.*

(Court of Civil Appeals of Texas. San Antonio.)

1. INSURANCE — CANCELLATION — RETURN OF UNEARNED PREMIUM—NECESSITY.

Under a provision of the New York standard fire insurance policy that it shall be canceled at any time by the company by giving notice of such cancellation, and that if it shall be canceled the unearned portion of the premium shall be returned on surrender of the policy, the repayment of the proper proportion of the premium, unless waived, is essential to a valid cancellation by the company, and notice without such repayment or a tender of the amount is ineffectual.

(For other cases, see Insurance, Cent. Dig. §§ 194, 524-530; Dec. Dig. § 244.)

2. INSURANCE—CANCELLATION BY MUTUAL CONSENT.

Regardless of the provisions of a fire insurance policy as to cancellation, the policy may be canceled by the mutual consent of the parties thereto.

(For other cases, see Insurance, Dec. Dig. § 246.)

3. INSURANCE—ACTION—QUESTION FOR JURY.

Where an insurance company gave notice that a policy was canceled without tendering the unearned portion of the premium, and insured did not object or request the return of the unearned premium but on the contrary thought the policy was canceled without such return and secured other insurance to replace that canceled, it was a question for the jury whether the policy was canceled by mutual consent.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

Appeal from District Court, Harris County; Charles E. Ashe, Judge. Action by A. D. Polemanakos against the Austin Fire Insurance Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

L. B. Moody, of Houston, for Appellant.

Wm. Thompson and Will C. Thompson, both of Dallas, for Appellee.

* Decision rendered, Nov. 5, 1913. Rehearing denied Dec. 3, 1913. 160 S. W. Rep. 1134.

AMUSEMENT SYNDICATE CO. ET AL. *vs.* MILWAUKEE
MECHANICS' INS. CO.—SAME *vs.* PRUSSIAN
NAT. INS. CO.*

(Supreme Court of Kansas.)

INSURANCE—POLICY—CONSTRUCTION—LOSS OF RENT—
COMPUTATION OF TERM.

A policy, insuring the owner of a building used for a theater, stores and offices, against loss of rent in case the building should be rendered untenable by fire, provided that, in case the structure were rebuilt, loss should be computed from the date of the fire and should cease when the building was rendered tenantable. It further provided that, if the owner should elect not to rebuild, the loss should be determined by the time which would have been required for that purpose. The building was destroyed by fire. It could not be rebuilt, and an office building was erected instead. *Held*, the loss is to be computed by the arbitrary rule of the policy without taking into account time for proof of loss, time for the removal of debris, and delay incident to inclement weather occurring in the season following the fire.

(For other cases, see Insurance, Cent. Dig. § 1283; Dec. Dig. § 507.)

Appeal from District Court, Shawnee County.

Two actions, both by the Amusement Syndicate Company and others, one against the Milwaukee Mechanics' Insurance Company, the other against the Prussian National Insurance Company. From judgments for plaintiffs, defendants appeal. Modified.

See, also, 85 Kan, 367, 116 Pac. 624.

E. S. Quinton, of Topeka, for Appellants.

Mulvane & Gault and D. R. Hite, all of Topeka, for Appellees.

* Decision rendered, Dec. 6, 1913. 136 Pac. Rep. 941. Syllabus by the Court.

ACCIDENT AND HEALTH.

SUPREME COURT OF MINNESOTA.

PETERSON

vs.

LOCOMOTIVE ENGINEERS' MUT. LIFE & ACCIDENT INS.
ASS'N.*

1. INSURANCE — ACCIDENT INSURANCE — BY-LAWS — CONSTRUCTION—"VISIBLE INJURY."

Plaintiff, a locomotive engineer, held an accident policy issued by defendant. The by-laws precluded recovery for "an invisible injury unless certified to by a medical expert designated by the association." Plaintiff's engine was derailed while running at a rapid rate. He sustained only slight external injuries, but there is evidence tending to show that for nearly two years, beginning a few days after the accident, he was mentally deranged, so as to unfit him for duty, and that this condition resulted from the accident. *Held* that, if his condition could be ascertained by observation or examination, it was a "visible injury" within the meaning of the by-law.

(For other cases, see Insurance, Cent. Dig. § 1170; Dec. Dig. § 456.)

(For other definitions, see Words and Phrases, vol. 8, p. 7330.)

2. INSURANCE—ACCIDENT POLICY—QUESTION FOR JURY.

Whether the alleged injury was visible and resulted from the accident were questions for the jury.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

3. INSURANCE—ACCIDENT POLICY—INSTRUCTIONS.

The court did not submit to the jury the question as to whether the alleged injury was visible, but charged, in substance, that if the injury existed, and "was due to an outside force," plaintiff was entitled to recover. Under the evidence, whether the injury was visible was a question for the jury, and should have been submitted to them.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1771-1784; Dec. Dig. § 669.)

Appeal from District Court, Hennepin County; Wm. E. Hale, Judge. Action by John R. Peterson against the Locomotive Engineer's Mutual Life & Accident Insurance Association. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Reversed.

Larrabee & Davies, of Minneapolis, for Appellant.
Henry Deutsch and Breding & Fleigelman, all of Minneapolis, for Respondent.

*Decision rendered, Dec. 5, 1913. 144 N. W. Rep. 160. Syllabus by the Court.

TAYLOR, C.

Plaintiff brought suit upon an accident policy issued by defendant, and recovered a verdict. A motion for a new trial was denied, and defendant appealed.

[1] While plaintiff, a locomotive engineer upon a Great Northern passenger train, was running at a rate of 45 or 50 miles per hour, his engine, for some unexplained reason, "jumped" the track and went down a 15 foot embankment. Plaintiff jumped or was thrown from the engine, and apparently was unconscious for a few moments, but arose unaided and went to the assistance of the fireman. The external marks of injury upon his person consisted of slight abrasions of the skin upon one of his elbows and one of his legs, and of black and blue spots which remained for several weeks. These wounds were superficial, and not of a serious nature. Immediately after the accident he assured his friends that he had escaped without injury of any consequence. However, when requested to take out another train a few days later, he declined on the ground that he was not in fit condition to do so, and has never since returned to work. There is evidence tending to show that his nervous and mental condition was abnormal, and his mind unbalanced to such an extent as to unfit him for work, for nearly two years after the accident.

The policy in controversy entitled plaintiff to an indemnity of \$15 per week for a period not exceeding 52 weeks, "if totally disabled by accidental injury from following his vocation." By their verdict, the jury found that he was disabled within the meaning of the policy. The by-laws of the association are made a part of the policy and contain the following provision: "No claim for weekly indemnity of any policyholder will be recognized when loss of time is caused by an invisible injury, unless certified to by medical expert designated by the association." Defendant never designated, and was never requested to designate, any medical expert to examine or certify as to plaintiff's injury and contends that the injury, if any there be, was an invisible injury within the meaning of the by-law, and that plaintiff cannot recover therefor in the absence of the prescribed certificate.

The purpose of such a provision is to protect the insurer against sham claims, by barring the insured from recovering for alleged injuries of which there is no proof, except his own assertion. But it is well settled that visible injuries, within the meaning of such a provision, are not limited to external injuries, but also include any internal injuries, the existence of which may be ascertained through observation or examination. *Union Casualty & Surety Co. vs. Mondy*, 18 Colo. App. 395, 71 Pac. 677; *Pennington vs. Pac. Mut. L. Ins. Co.*, 85 Iowa, 468, 52 N. W. 482, 39 Am. St. Rep. 306; *Barry vs. U. S. Mut. Acc. Ass'n (C. C.)* 23 Fed. 712; *Id.*, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60; *Menneilly vs. Employers' Liability Assur. Corp.*, 148 N. Y. 596,

43 N. E. 54, 31 L. R. A. 686, 51 Am. St. Rep. 716; Gale vs. Mutual Aid & Acc. Ass'n. 66 Hun, 600, 21 N. Y. Supp. 893; Horsfall vs. Pac. Mut. Life Ins. Co., 32 Wash. 132, 72 Pac. 1028, 63 L. R. A. 98 Am. St. Rep. 846; Thayer vs. Standard Life & Acc. Ins. Co., 68 N. H. 577, 41 Atl. 182; Dent vs. Railway Mail Ass'n (C. C.) 183 Fed. 840.

[2] If plaintiff's mental derangement was such as to be observable and could be ascertained by proper examination, we think it was a visible injury within the meaning of the by-law. Of course it must be shown to have resulted from the accident before a recovery can be had. But the evidence tending to show that the derangement existed, that it was observable, and that it resulted from injuries received in the accident, was sufficient to make these questions proper matters for determination by the jury.

[3] 2. In defining the meaning and effect of the by-law the court, among other things, charged the jury: "If it can be determined from the facts in the case that the thing which produced the internal injury came from the outside, that will be sufficient to come within the terms of this section. So if you conclude, from all the evidence in the case, that the injury which he complains of—the mental disturbance—was due to an outside force, either from jumping or falling from the engine, and that that was the proximate cause of this injury, then he would be entitled to recover, providing you find that the injury existed as claimed by him; that is, the result of the injury—the disturbance of the mind."

The jury must have understood from the instructions that if the injury resulted from external force, the by-law did not bar recovery therefor, even if the injury was invisible. They were told in substance that if the alleged injury existed, and "was due to an outside force," plaintiff was entitled to recover. Whether the injury was visible was not submitted to them to determine. The charge practically eliminated this provision of the by-laws from the case, and submitted to the jury only the question as to whether plaintiff's mind had been unbalanced as claimed, and, if so, as to whether that condition resulted from the accident. This was error. Whether the injury was visible was not established conclusively, and should have been left to the jury to determine.

Order reversed.

ST. LOUIS COURT OF APPEALS.

MISSOURI.

MITCHELL

vs.

GERMAN COMMERCIAL ACCIDENT CO.*

1. INSURANCE—ACCIDENT INSURANCE—CONSTRUCTION OF POLICY—RISK.

Under policy against loss of life from injuries caused exclusively by external, violent, and accidental means, resulting in death within 30 days therefrom, received while riding as a passenger in a place regularly provided for the transportation of passengers within a surface car or other public conveyance, in consequence of accident causing actual and material damage to the conveyance, the beneficiary of one killed while attempting to board a street car, but who had not become a passenger, could not recover.

(For other cases, see Insurance, Cent. Dig. §§ 1164, 1173, 1174; Dec. Dig. § 452.)

2. INSURANCE—POLICY—LIBERAL CONSTRUCTION.

Language employed in insurance policy is to be construed so as to effectuate the insurance, and not so as to defeat it, for the insurance is the very object and purpose of the policy.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

3. INSURANCE—POLICY—CONSTRUCTION AGAINST INSURER.

Where the language employed in a policy is in the least doubtful, it is to be more strictly construed against the insurer who selects it and incorporates it into the policy, and in such a way as to protect the insured, and hence, where words are susceptible of the interpretation given them by the insured to afford indemnity, they will be so construed although the insurer in fact intended otherwise.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

Appeal from St. Louis Circuit Court; Charles Clafin Allen, Judge.
Action by Katherine Mitchell against the German Commercial Accident Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Barclay, Fauntleroy, Cullen & Orthwein, Igoe & Carroll, and Wm. R. Gilbert, all of St. Louis, for Appellant.

Jones, Jones, Hocker & Davis, of St. Louis, for Respondent.

NORTON, J.

This is a suit on a policy of accident insurance. At the conclusion of the evidence the court gave judgment for defendant as a conclusion of law, and plaintiff prosecutes the appeal.

It appears that the plaintiff is the widow of Charles C. Mitchell,

* Decision rendered, Dec. 2, 1913. 161 S. W. Rep. 362.

the insured, and as such she is the beneficiary in the policy. Charles C. Mitchell, plaintiff's insured husband, came to his death from injuries received while attempting to board a moving street car in the city of St. Louis, but before he had entered the same. The suit is for \$1,000, the death benefit specified in the policy, provided death occur from accidental cause while the insured is riding as a passenger in a place regularly provided for the transportation of passengers within a car.

It is argued for plaintiff that the \$1,000 death benefit vouchsafed in the policy obtains in favor of plaintiff if the death shall be caused from any external or violent injury occasioned through accident, and the question for consideration relates alone to an interpretation of the policy provision touching this subject-matter. So much of the policy as is relevant will be copied here. After preliminary recitals, the policy stipulates insurance as follows:—

"A. In the sum of \$1,000 for loss of life, or special features—	
Loss of both entire eyes, meaning total, permanent, and irrecoverable loss of the sight of both eyes.....	\$500
Loss of both entire hands, by actual and complete severance at or above the wrists.....	\$500
Loss of both entire feet, by actual and complete severance at or above the ankles	\$500
Loss of one entire hand and one entire foot, by actual and complete severance at or above the wrist and ankle....	\$250
Loss of one entire hand, by actual and complete severance at or above the wrist.....	\$100
Loss of one entire foot, by actual and complete severance at or above the ankle	\$100
Loss of one entire eye, meaning total, permanent, and irrecoverable loss of the sight of one eye.....	\$ 50

"Provided such injuries are effected exclusively by external, violent, and accidental means, which shall, independently of all other causes, immediately, continuously, and wholly disable the insured, or be the sole cause of the death, or dismemberment, or loss of sight of the insured, within thirty days from the date of the event causing such injury, and said injuries to the insured shall occur while riding as a passenger in a place regularly provided for the transportation of passengers, within a surface or elevated railroad car, steamboat, or other public conveyance provided by a common carrier for passenger service only, including a passenger elevator, and in consequence of a collision or other accident causing actual and material damage to the conveyance in which the insured is so riding."

[1-3] By way of condensation, we may eliminate, for the moment, the several specifications for loss of eyes, hands, feet, etc., and consider that alone which pertains to the loss of life, for such is the case in judgment. In such circumstances the

policy provides insurance: "A. In the sum of \$1,000 for loss of life * * * provided such injuries are effected exclusively by external, violent, and accidental means which shall, independently of all other causes * * * be the sole cause of the death * * * within thirty days from the date of the event causing such injury, and said injuries to the insured shall occur while riding as a passenger in a place regularly provided for the transportation of passengers within a surface or elevated railroad car, steamboat, or other public conveyance provided by a common carrier for passenger service only, including a passenger elevator, and in consequence of a collision or other accident causing actual and material damage to the conveyance in which the insured is so riding." It is conceded here that there was no collision or other accident causing actual and material damage to the street car plaintiff's husband sought to board, and it is conceded, too, that he had not attained a place within the car, for he met his death on the street in an attempt to take passage on the conveyance. The language of the policy is entirely clear to the effect that insurance in the sum of \$1,000 for accidental death is vouchsafed only in those cases where the injuries received which result in death occur while riding as a passenger in a place regularly provided for the transportation of passengers by a common carrier, etc. The proviso of the policy above copied goes to the effect, not only that the injuries from which the death results shall be effected exclusively by external, violent, and accidental means, but through the conjunction "and" stipulates that it is provided, as a condition of the insurance as well, the injuries to the insured shall occur while riding as a passenger, etc. This is entirely clear.

There can be no doubt of the rule of construction which obtains, to the effect that language employed in insurance policies is to be construed so as to effectuate the insurance, and not for the purpose of defeating it, for, it is said, the insurance vouchsafed is the very object and purpose of the contract. It is true, too, that, if the language employed in the policy is in the least doubtful, it is to be more strictly construed against the company who selects and incorporates it into the policy, and in such a way as to protect the interests of the insured, who has paid a consideration for the indemnity. See *Stix vs. Travelers' Indemnity, etc., Co.*, 157 S. W. 870, 872. Therefore, as another court has expressed it, if the words employed in the policy are susceptible of the interpretation given them by the insured to afford indemnity, they will be so construed although the insurer in fact intended otherwise. See *La Force vs. Williams City Ins. Co.*, 43 Mo. App. 518, 530. Under this rule of construction, it is urged the policy should be interpreted here as one providing indemnity against every death resulting from external injuries received through an accidental cause, for it is said that a sub-

sequent provision of the policy implies as much in discriminating between injuries, "fatal or otherwise," and therefore suggests the thought that the injuries contemplated in the portion of the policy above copied which are covered only when riding within the passenger car are those other than from which death ensues. Among the conditions printed on the policy, it is stipulated that "this insurance does not cover * * * injuries, fatal or otherwise, resulting from vertigo or from exposure to unnecessary danger * * * or while racing," etc. Because this exemption from liability for loss on account of such injuries, fatal or otherwise, provided in terms in this condition of the policy does not include as well an express exemption from liability for death from accident when not riding as a passenger within the car, it is urged the prior provisions of the policy should be construed as limiting the insurance on the condition of being a passenger within the car to those injuries only from which death does not ensue. But we are unable to discern anything in this portion of the policy which should be regarded as enlarging the covenant of indemnity in the provisions above set forth. It is obvious this condition of the policy provides an exemption in certain cases might be otherwise included as within the covenant of insurance; but it is equally obvious that the covenant of insurance whereby \$1,000 is stipulated in event of death does not include a death from accident, except it occur while the insured is a passenger. Though it be that the language of insurance contracts is to be construed most favorably to the insured and against the insurer with a view to effectuating the insurance, and that all doubtful language is to be resolved in favor of the insured, the courts are not authorized to seize upon certain and definite covenants expressed in plain English with violent hands, and distort them so as to include a risk clearly excluded by the insurance contract.

The judgment should be affirmed. It is so ordered.
Reynolds, P. J., and Allen, J., concur.



SUPREME COURT OF NEW YORK.
APPELLATE DIVISION, SECOND DEPARTMENT.

TURNER

vs.

NEW YORK SAFETY RESERVE FUND.*

1. INSURANCE—CONSTRUCTION OF CONTRACT—TERM OF RISK.

A life insurance policy providing also for accident insurance issued September 1, 1907, provided that the insured was entitled to participate in

* Decision rendered, Nov. 7, 1913. 144 N. Y. Supp. 261.

the funds of the company to an amount not exceeding \$500, payable according to the terms and conditions of attached coupons, which were four in number, and provided for the payment of not to exceed \$500 at the end of each period of five years, if the policy was then in force. The by-laws provided that the policy should terminate in five years, but that it might be continued in force for a further period of five years, in accordance with the by-laws, which however, did not indicate the procedure for such continuance. It further provided that, if payment of the premiums was not made on or before the last of any month, the policy would lapse, but might be reinstated by making such monthly payment within 30 days thereafter, but that no benefits would be paid for sickness contracted or illness occurring during the period that the payment was due and unpaid. A circular letter advising insured to continue the insurance for another five years stated that the policy was a continuous one, and might be carried indefinitely, if the premiums were paid promptly. Insured often withheld payment of the premium due on the 1st day of each month until the middle of the month, without the policy lapsing, and without being notified that he would be deprived of any benefit; but on one occasion when he was in arrears for 60 days he received notice that the policy had lapsed. The general agent of the company told insured that premiums might be paid at any time 30 days after they became due, and a guide issued by the company and letters written by it to the general agent were to the same effect, and it had been the custom of the company to pay claims, though the premium was not paid on the 1st of the month, and though the claim arose while the premium was overdue. On September 3, 1912, two days after the expiration of the first five-year period, plaintiff was injured. On September 13th he paid the premium for that month, and thereafter paid four other premiums, which were accepted without any notice that his policy had lapsed. *Held*, that the policy was a continuous one, and subject to lapse only for nonpayment of the premium either before or after the expiration of the first five-year period and hence had not terminated prior to the injury.

(For other cases, see Insurance, Cent. Dig. §§ 372-378; Dec. Dig. § 177.)

2. INSURANCE — PAYMENT OF PREMIUMS — TIME OF PAYMENT.

Under such policy, the premiums due on the first of the month could be paid at any time within the month without the policy lapsing, and hence it had not lapsed for nonpayment of the September premium prior to the injury.

(For other cases, see Insurance, Cent. Dig §§ 914, 1034; Dec. Dig. § 357.)

3. INSURANCE—RISKS COVERED—ACCIDENT INSURANCE.

Such policy being a continuous one, a provision of the by-laws that benefits would not be paid for illness or death occurring before the policy had been in force two months did not apply to the first two months of the second five-year period.

(For other cases, see Insurance, Cent. Dig. §§ 372-378; Dec. Dig. § 177.)

Appeal from Trial Term, Orange County.

Action by William W. Turner against the New York Safety Reserve Fund. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before Jenks, P. J., and Burr, Carr, Stapleton, and Putnam, JJ.

John C. R. Taylor, of Middletown, for Appellant.
Frank Lybolt, of Port Jervis, for Respondent.

STAPLETON, J.

The appeal is from that part of a judgment which awards the plaintiff \$250 damages, together with costs. The action was upon an insurance policy. It was tried by the court; a jury having been waived.

[1, 2] On the 1st day of September, 1907, the defendant issued to the plaintiff a policy of insurance. The premium was \$4, payable monthly. The policy read in part:—

"William W. Turner is a member of this company, and entitled * * * to participate in the funds thereof to an amount not exceeding five hundred dollars, payable to such member according to the terms and conditions of the coupons hereto attached, and in accordance with the by-laws of the company governing such funds, now in force or which may hereafter be enacted. * * * In case of death of said member, by accident or otherwise, while this policy is in full force, it shall terminate, and there shall be paid to Bertha O. Turner the sum of five hundred dollars in accordance with the by-laws of said company governing such payment."

There was also a provision that for the loss of one limb by accident the insured should receive one-half of the death benefit, and that, in case he should, by reason of sickness or accident, be rendered incapable of following his occupation, he should be paid the sum of \$20 weekly, such payment to be deducted from any death or other benefit.

Among many clauses, the by-laws contained the following:—

"Benefit loans under this policy will not be paid for illness or death occurring before the policy has been in force two months. * * * When the policy has been in full force for a period of five years, it shall terminate, and there shall be paid to the members named therein an amount in accordance with the coupons thereto attached. The policy may however, be continued in force for a further period of five years in accordance with the by-laws of the company."

What procedure there was, if any, for the continuance of the policy for a further five-year period, the by-laws do not disclose.

The coupons alluded to were four in number, and provided for the payment to the plaintiff of a sum not to exceed \$500, in the event of the policy being then in full force, at the end of each cycle of five years after the date of the policy.

The by-laws also provided:—

"Should payment not be made on or before the last of any month, the policy will lapse, but may be reinstated by making such monthly payment within thirty days thereafter, subject, however, to the condition that no weekly benefit or other payments thereunder shall be made for sickness contracted or accident occurring during the period that monthly payment is due and unpaid."

On September 3, 1912, five years and two days after the issuance of the policy, and hence two days after the expiration of

the first five-year cycle, the plaintiff, by an accident which threw him under a train of cars, sustained an injury which rendered necessary the amputation of his left leg just below the knee.

Prior to the date on which the accident occurred, the plaintiff received from the defendant a circular letter reading as follows:

"The officers of the company do not hesitate to advise you to continue your insurance under your policy for another five years. Your policy is a continuous policy, and may be carried indefinitely, provided the premiums are paid promptly."

At the time of the accident, however, the plaintiff had not paid the premium for the current month—the first month of the second cycle—nor had any other step been taken by him toward having the policy continued. Payment for September was made on the 13th of that month, and subsequent payments were made, and receipts therefor given, on September 30th, October 31st, November 30th and December 31st. When plaintiff made the payment on September 13th, he was not notified that he was in arrears, or that his policy had lapsed, nor were the premiums refused either at that time or at the making of the subsequent payments.

The evidence showed that plaintiff had been dilatory in paying his premiums, often withholding them until some time in the middle of the month, and in a few instances as long as two months. When payments were made during the month on the 1st of which they had become due, the policy was not lapsed, nor was the plaintiff notified that he would be deprived of any benefit under it; but on the occasion when he became in arrears for as long as sixty days he received notice that his policy had lapsed.

The general agent through whom the policy was issued informed the plaintiff that payments could be made at any time within thirty days after the due date without incurring a lapse of the policy. The general agent handed him a copy of the "Insurance Guide," published by the defendant, and pointed out to him therein the statement showing when payments could be made. The statement read:—

"Thirty days' time will be allowed each policyholder in which to make these payments before they are suspended from benefit, after which, even though reinstated, they are suspended from all benefits until paid, and, should premiums remain unpaid for sixty days, the policy will lapse."

This statement was contained in the copies of the "Insurance Guide" that were issued before the plaintiff received his policy, and was retained in the copies that were received monthly thereafter until September, 1910. Up to September, 1912, plaintiff had never received any notice of a change regarding the time during which the premiums could be paid.

As authority for the statement of the general agent that payments could be made at any time during the month, two letters, received by the general agent, and signed by the defendant by its

general manager, were admitted in evidence. The first letter, dated December 5, 1906, read:—

"Contrary to our advertising matter and premium booklet, we give the entire month in which to make payment of premium, and the agent reports to us on or before the 5th of the following month. That is to say, for December premiums which are due on the first of the month, the agent has the entire month in which to collect, and until the 5th of the following month to remit to us. The method and time of payment is a matter of education."

The second letter, dated February 15, 1908, read:—

"In accordance with the practice of other companies and the terms of our policies, we allow thirty days in which to make payments before lapsing the policies. Unless premiums are paid when due, questions are raised which cause annoyance and correspondence, and sometimes result in considerable trouble and disappointment for the insured or their beneficiaries. We have prepared reinstatement blanks and inclose a few herewith. Acting under instructions of the company, we shall hereafter be obliged to refuse reports and remittances for past due premiums unless accompanied in every case by these reinstatement blanks properly executed."

Prior to the accident to the plaintiff, it was the custom of the defendant to pay claims where payments had not been made on the 1st of the month, and the claims had arisen during the time intervening between the 1st and the date of payment.

Upon the foregoing facts the trial justice was justified in finding that on September 3, 1912,—

"at the time of the accident to plaintiff, and the loss of his left leg as aforesaid, the said policy of insurance so issued to plaintiff by defendant was a valid and existing instrument in full force and effect, and plaintiff was entitled to recover the benefit therein named."

[3] The appellant contends that, (1) the five-year period having expired at the time of the plaintiff's injuries, his policy had terminated, and defendant had ceased to be liable thereunder, and (2) that to sustain the judgment is to determine that the defendant insured against the past instead of the future. Both contentions are without merit. *De Frece vs. Nat. Life Ins. Co.*, 136 N. Y. 144, 32 N. E. 556, and cases cited; *Insurance Co. vs. Eggleston*, 96 U. S. 577, 24 L. Ed. 841. The by-laws of the company, the company's general custom with regard to payments, its letters to its general agent, and its circular letter to the plaintiff, and its receipt without objection of the premiums during the months of September, October, November, and December, 1912, all lead to the conclusion that the policy was, as the circular letter stated, "a continuous policy," and subject to lapse upon but one contingency, namely, the failure of the plaintiff to pay each premium within the month on the 1st of which it became due, whether the month

was before or after the expiration of five years from the date of issue. The policy being a continuing one, the clause providing against the payment of benefits "for illness or death occurring before the policy has been in force two months" applies to the first two months following the issuance of the policy, and to that period only.

The judgment should be affirmed, with costs.

TOWNSEND vs. FIDELITY & CASUALTY CO. OF NEW YORK (SOWER, Intervener).—ELLIS vs. SAME (HALL, Intervener).*
(Supreme Court of Iowa.)

1. INSURANCE—POLICY—LIMITATION OF CHANGE OF BENEFICIARY—VALIDITY.

A condition of an insurance policy, prescribing the method of changing beneficiaries, is valid and ordinarily renders ineffectual any attempt to make such change in any other manner.

(For other cases, see Insurance, Cent. Dig. § 1469; Dec. Dig. § 587.)

2. INSURANCE—RIGHTS OF BENEFICIARY—SUBSTITUTION.

The beneficiary of a life insurance policy acquires no such rights therein as can prevent the insured from substituting another beneficiary at will, where the policy reserves to the insured the right to change the beneficiary.

(For other cases, see Insurance, Cent. Dig. § 1470; Dec. Dig. § 586.)

3. INSURANCE — POLICY — CONSTRUCTION — "ASSIGNMENT" — "CHANGE OF BENEFICIARIES."

A provision in a life insurance policy that no assignment of interest under the policy should bind the insurer, unless its written consent was indorsed thereon, did not render ineffective a change of beneficiary made by insured in his will; the word "assignment" as used in the policy not equivalent to or inclusive of a "change of beneficiaries."

(For other cases, see insurance, Cent. Dig. § 1469; Dec. Dig. § 587.)

(For other definitions, see Words and Phrases, vol. 8, p. 7584.)

4. INSURANCE—POLICY—RIGHT TO CHANGE BENEFICIARY.

That an insurance policy, as a mere incident to the principal contract and without any independent consideration, insured the beneficiary, if between the ages of sixteen and sixty years old and sound mentally and physically, against certain injuries, did not deprive the insured of his right to change the beneficiary without the insurer's consent, where no other restriction was placed upon the insured with reference to the age or condition of health of the beneficiary, and no examination of the beneficiary or approval by the insurer was required.

(For other cases, see Insurance, Cent. Dig. § 1469; Dec. Dig. § 587.)

* Decision rendered, Dec. 15, 1913. 144 N. W. Rep. 574.

5. INSURANCE—CHANGE OF BENEFICIARY—WILLS.

Where a life insurance policy was silent as to the method of changing the beneficiary a provision of the insured's will making such change was valid.

(For other cases, see Insurance, Cent. Dig. § 1469; Dec. Dig. § 587.)

Appeal from District Court, Polk County; James P. Hewitt, Judge.

Actions at law upon policies of accident insurance. There was in each case a trial to the court without a jury and judgment in each for the intervener. The plaintiffs appeal. As the two cases present similar states of fact and the rights of the parties turn upon the construction to be placed on like clauses in the insurance contract, they have been submitted together and will be disposed of in one opinion. Reversed.

Carr, Carr & Evans, of Des Moines, for Appellants.

Sullivan & Sullivan, of Des Moines, for Defendant Appellee.

Louis Englander, of Cleveland, Ohio, and I. M. Earle, of Des Moines, for Appellees Intervenors.



**UNITED STATES HEALTH & ACCIDENT INS. CO. vs.
EMERICK. (No. 8,096.).***

(Appellate Court of Indiana, Division No. 1.)

**i. REFORMATION OF INSTRUMENTS—PAROL EVIDENCE—
MODIFYING CONTRACT.**

While ordinarily previous negotiations are merged into the written contract, and cannot be shown to modify such contract, they may be shown in case of fraud or mistake, resulting in such prior negotiations being omitted from the contract.

(For other cases, see Reformation of Instruments, Cent. Dig. §§ 155, 156; Dec. Dig. § 44.)

2. INSURANCE—ACTIONS—ALLEGATIONS.

A complaint alleged that defendant solicited decedent to take out accident insurance in consideration of an assignment of his wages, and agreed that the insurance should become effective on July 11th, and to furnish a policy containing such agreement, and that defendant, on July 20th, mailed a policy to decedent, which contained all of the terms agreed to on July 11th, "except by the mutual mistake" of decedent and defendant "said policy was dated July 20th." Held, that the theory of the complaint was that the contract sued on was that agreed to by the parties, except that it was by mutual mistake dated July 20th instead of July 11th.

(For other cases, see Insurance, Cent. Dig. §§ 1575-1580, 1584-1586, 1592, 1598; Dec. Dig. § 629.)

**3. LIMITATION OF ACTIONS—COMMENCEMENT OF ACTION—
AMENDMENT—NEW CAUSE OF ACTION.**

Where the amended complaint, in an action on an accident policy, was based on the same policy sued on in the original complaint, except that

* Decision rendered, Dec. 12, 1913. 103 N. E. Rep. 435.

the amended complaint sought a reformation of the contract by alleging mutual mistake in dating the policy, the amendment did not substitute a new cause of action, and will be treated as of the date of the filing of the original complaint.

(For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.)

4 PLEADING—AMENDMENT—NEW CAUSE OF ACTION.

The test for determining whether an amended complaint alleges a new cause of action is whether recovery on the original complaint would bar recovery under the amended complaint.

(For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 708½, 709; Dec. Dig. § 248.)

5. APPEAL AND ERROR—FINDINGS—CONCLUSIVENESS.

The Appellate Court will not weigh the evidence, and will not disturb the trial court's decision, if there is any evidence to support each material fact upon which it is based.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.)

Appeal from Circuit Court, Marion County; Charles Remster, Judge. Action by Nellie R. Emerick against the United States Health & Accident Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. P. Shorts, of Saginaw, Mich., and G. R. Eastabrook, of Indianapolis, for Appellant.

Williams & Schlosser, of Indianapolis, and William Amsden, of Marion, for Appellee.



KAUS VS. GRACEY ET AL.*

(Supreme Court of Iowa.)

1. INSURANCE — VALIDITY — ASSENT—DURESS — QUESTION FOR JURY.

Whether an assignment of an accident insurance policy to defendants was obtained by duress *held* for the jury.

(For other cases, see Insurance, Cent. Dig. § 486; Dec. Dig. § 216.)

2. CONTRACTS—ASSENT—DURESS.

A contract is void for duress where a party's signature thereto was obtained by threats relating to his personal liberty or safety or tending to deprive him of the free exercise of his will and prevent a meeting of minds.

(For other cases, see Contracts, Cent. Dig. §§ 431-440; Dec. Dig. § 95.)

3. PRINCIPAL AND AGENT—ACTS OF AGENT—DURESS.

Where defendants, creditors of insured, after he had suffered an injury which resulted in his death, induced his brother to secure from in-

* Decision rendered, Dec. 15, 1913. 144 N. W. Rep. 625.

sured and his wife an assignment of the proceeds of the policy after having made threats of prosecution of insured to the brother, he was defendants' agent in procuring the assignment so as to charge them with the duress practiced by him to procure the assignment.

(For other cases, see Principal and Agent, Cent. Dig. §§ 589-598; Dec. Dig. § 158.)

4. INSURANCE—CONSIDERATION—PRE-EXISTING DEBT.

A pre-existing indebtedness constitutes a sufficient consideration for an assignment of the proceeds of an insurance policy.

(For other cases, see Insurance, Cent. Dig. § 477; Dec. Dig. § 210.)

5. TRIAL—REQUESTS TO CHARGE—INSTRUCTIONS GIVEN.

It is not error to refuse requests to charge substantially covered by instructions given.

(For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.)

6. PLEADING—REPLY—DEFENSES—ELECTION.

In an action to recover possession of an accident insurance policy, defendants pleaded an assignment of the proceeds, setting out a copy of the assignment, and plaintiff replied in two counts, pleading duress in the execution of the assignment and want of consideration. *Held*, that it was not error to refuse to strike out the second count of the reply for failure to admit the execution of the assignment, nor was plaintiff required to elect on which of the defenses in the reply he would rely.

(For other cases, see Pleading, Cent. Dig. §§ 1147-1155, 1199-1209; Dec. Dig. §§ 362, 369.)

Appeal from District Court, Ida County; M. E. Hutchinson, Judge.
Action at law to recover possession of an accident insurance policy.
From a verdict and judgment in favor of plaintiff, this appeal is taken.
Affirmed.

J. B. Tourgee, of Holstein, and Johnston Bros., of Ida Grove, for Appellants.

J. C. Walter, of Ida Grove, for Appellee.

CASUALTY, SURETY AND MISCELLANEOUS.**SUPREME COURT OF MICHIGAN.**

PATTERSON

vs.

STANDARD ACCIDENT INS. CO.*

1. INSURANCE — AUTOMOBILE ACCIDENT POLICY — CONSTRUCTION—"SUIT."

Under an automobile accident insurance policy, providing that the insurer should defend any suits brought against insured on account of automobile accidents, the insurer was not required to defend a criminal proceeding; the word "suit" referring only to civil actions and, in its most technical sense, only to proceedings in equity.

(For other cases, see Insurance, Dec. Dig. § 437.)

(For other definitions, see Words and Phrases, vol. 7, pp. 6769-6778; vol. 8, p. 7809.)

2. INSURANCE — AUTOMOBILE ACCIDENT POLICY — CONSTRUCTION.

All the provisions of an automobile accident insurance policy will be construed together to determine the subject-matter and the risk insured against.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

Error to Circuit Court, Branch County; Frederick W. Knowlen, Judge.
Action by James R. Patterson against the Standard Accident Insurance Company. From a judgment for defendant, plaintiff brings error. Affirmed.

Argued before Steere, C. J., and Moore, McAlvay, Brooke, Kuhn, Stone, Ostrander, and Bird, JJ.

Joseph L. Hooper and Bernard J. Onen, both of Battle Creek, for Appellant.

Keena, Lightner, Oxtoby & Oxtoby, of Detroit, for Appellee.

STEERE, C. J.

This action was brought on a certain so-called accident policy of insurance, issued to plaintiff by defendant, for his protection from specified losses which might result to him in connection with the use of two designated automobiles within a stated period of time.

Within the period covered by the policy, a young man named Reagan was killed in a collision with one of the automobiles mentioned, while plaintiff was driving it. An inquest held over the remains of the young man resulted in a finding of the coroner's

* Decision rendered, Dec. 20, 1913. 144 N. W. Rep. 491.

jury that he came to his death through plaintiff's negligence in operating his automobile, and criminal prosecution was recommended. An agent of defendant, experienced in that class of work, made an investigation of the accident, viewing the premises and taking the statements of witnesses, and attended the inquest. He informed plaintiff that the company would defend him in any civil action brought against him for damages, but that the insurance did not cover criminal cases.

Plaintiff was subsequently arrested and prosecuted for manslaughter. He requested the insurance company to defend him, which it declined to do on the ground that its policy did not include criminal prosecutions. He then employed his own counsel, being ultimately tried for the offense and found not guilty by the verdict of a jury. An action, entitled *Reagan vs. Patterson*, was also begun against him in the Branch County Circuit Court by the father of deceased, in which plaintiff claimed \$10,000 damages for the death of his son; the case involving the same facts as the criminal prosecution. At the time this case was argued here, the insurance company was defending that civil case for damages, under the requirements of its policy. Plaintiff expended \$2,258.46 in attorney fees and other expenses in his defense in the criminal prosecution against him for manslaughter. This action is to recover from defendant those expenditures.

[1] Defendant's obligations as stated in the policy in question were as follows:—

"(1) To indemnify the assured named and described in the declarations against loss from the liability imposed by law upon him for damages on account of bodily injuries, including death, at any time resulting therefrom, accidentally sustained by any person or persons, by reason of the maintenance or use of any of the automobiles enumerated and described in said declarations, provided such bodily injuries are suffered within the policy period therein defined. This policy shall also cover such bodily injuries if caused by means of loading or unloading goods carried on automobiles used for transportation and delivery of materials or merchandise and so specified in said declarations.

"(2) To serve the assured upon notice of such injuries by such investigation thereof, or by such negotiation or settlement of any resulting claims as may be deemed expedient by the company.

"(3) To defend in the name and on behalf of the assured any suits which may at any time be brought against him on account of such injuries, including suits alleging such injuries and demanding damages therefor, although such suits, allegations or demands are wholly groundless, false or fraudulent.

"(4) To pay all costs taxed against the assured in any legal proceeding defended by the company according to agreement 3 above, and all interest accruing after entry of judgment upon such part

of same as is not in excess of the company's limit of liability as hereinafter expressed; and

"(5) To reimburse the assured for the expense incurred in providing such immediate surgical relief as is imperative at the time of the accident."

It is claimed by plaintiff that the criminal prosecution instituted against him for manslaughter was a suit brought against him on account of bodily injuries alleged to have been sustained by reason of the use of one of the automobiles described in the policy; that under the agreement in said paragraph 3 the insurance company was obligated to defend such suit; that, having refused to do so, it is liable to him on breach of the contract for expenditures actually and necessarily made by him in employing counsel and assuming the defense of said criminal case.

The two general grounds of defense urged and argued are:

"(1) That the word 'suit' does not include criminal prosecutions brought on behalf of the people of the state of Michigan; and

"(2) That it would be against public policy to permit an insurance company to agree in advance to defend a criminal proceeding."

The word "suit," unqualified by adjective or context, has possible meanings foreign to this inquiry. When used with reference to courts, it necessarily implies a law suit, defined by the Century Dictionary as "a suit at law or in equity; an action or a proceeding in a civil court; a process in law instituted by one party to compel another to do him justice." It would be a forced and unnatural construction to hold that the word as used in this accident policy is intended to comprehend criminal prosecutions instituted and conducted by public officials in the name of the people, presumably for the punishment and suppression of crime.

It must be conceded that the word "suit," as applied to legal controversies, both by the legal profession and others, is now used and recognized as a generic term of broad significance, often understood and used, even by Legislatures and courts, to designate almost any proceeding in a court, even, though rarely, being applied to a criminal prosecution in certain connections. Commonwealth vs. Moore, 143 Mass. 136, 9 N. E. 25, 58 Am. Rep. 128. In its strict, technical meaning, more particularly where the distinction between law and chancery is retained, as in this state, is "a proceeding in equity, the proper word for a litigation in chancery, a usual and technical designation of a proceeding in equity," as distinguished from an action at law. 37 Cyc. 524.

But, irrespective of lexicographers and precise technical definition, the expression "criminal suit" is unnatural and awkward to the professional ear and is seldom used, even in common parlance. "Suit," in its general, unqualified use in legal documents, such as the one before us, naturally means, and should be construed as intended to include, the mode or manner authorized and adopted

by law to redress civil injuries. Such is the view expressed by able authorities when carefully considering and directly treating the question. Many of these authorities are cited in 27 Cyc. 522. In the lengthy and exhaustive case of Cohen vs. Virginia, 19 U. S. (6 Wheat.) 264, 5 L. Ed. 257, Chief Justice Marshall says: "What is a suit? We understand it to be the prosecution or pursuit of some claim, demand, or request; in law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, 'the being put in possession of that right whereof the party injured is deprived.' The instruments whereby this remedy is obtained are a diversity of suits and actions, which are defined by the Mirror to be 'the lawful demand of one's right'; or, as Bracton and Fleta express it, in the words of Justinian, 'jus possuendi in justicio quod alicui debetur.' Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right."

[2] Furthermore, the two essentials of a contract of insurance which are to be considered together in this inquiry are the subject-matter and the risk insured against. The two automobiles constitute the subject-matter in relation to which the risk was assumed. Construing the various provisions of the policy together, we think it clearly evident that the controlling thought as to indemnity, the thing contracted for, was protection against risk of liability for injury resulting from accidents in the operation of the automobiles, not risk of public prosecution for crimes or misdemeanors committed in the use of them; and we conclude from the context that in this policy the word "suits" must be taken to mean civil suits which would determine the pecuniary liability of defendant for injury to person or property; suits which, because of its promised indemnity, defendant was necessarily interested in defending.

The learned circuit judge rightly held "that the provisions of said policy, read together, exclude any construction making it the legal duty of defendant to defend plaintiff on the criminal charge of manslaughter, and that consequently the defendant is entitled to an instructed verdict."

As these views dispose of the case, it becomes unnecessary to consider the other interesting question raised by defendant.

The judgment is affirmed.

ST. LOUIS COURT OF APPEALS.

MISSOURI.

CENTURY REALTY CO.

vs.

FRANKFORT MARINE, ACCIDENT & PLATE GLASS INS. CO.
ET AL.*

1. INSURANCE — LIABILITY INSURANCE — CONTRACT — "INTEREST."

A policy insuring the owner of a building from a liability for damages on account of the bodily injury or death of any person from accident in or about the premises of the assured limited the liability of the insurer as to any one person to \$5,000. Subsequent clauses of the policy provided that, in case legal proceedings were taken on a claim against the assured, the insurer should at its own cost defend, and should have entire control of the defense, but if it should offer to pay the assured the full amount for which it is liable it should not be bound to defend, nor be liable for any costs or expenses which the assured might incur in defending, and that the insured should not, except at his own cost, settle any claim nor incur any expenses without the consent of the insurer. *Held* that, a judgment against the owner having been affirmed on appeal, the insurer, which conducted the defense and prosecuted the appeal, was liable, not only for the amount of the judgment, which was \$5,000, but for the costs and the interest which, pending the appeal, accrued thereon, in accordance with Rev. St. 1909, § 7181, for interest is the compensation which is paid by a debtor for the detention of the debt, and, the insurer having delayed the payment, the interest must be considered as part of the costs and expenses; its liability not depending upon judgment first being rendered against the insured and payment made.

(For other cases, see Insurance, Cent. Dig. § 1791; Dec. Dig. § 666.)

2. INSURANCE—CONTRACTS—CONSTRUCTION.

In case of ambiguity, a contract of insurance should be construed most strongly against the insurer.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

Appeal from St. Louis Circuit Court; Eugene McQuillan, Judge. Action by the Century Realty Company against the Frankfort Marine, Accident & Plate Glass Insurance Company, of Frankfort-on-the-Main, Germany, and the Traveler's Insurance Company, of Hartford, Conn. From a judgment against the first named defendant, it appeals. Affirmed.

Seddon & Holland, of St. Louis, for Appellant.
Dawson & Garvin, of St. Louis, for Respondent.

On April 29, 1903, one May Travis Cooper sustained injuries from an accident in a passenger elevator located in the Century

* Decision rendered, Dec. 2, 1913. Rehearing denied, Dec. 16, 1913. 161 S. W. Rep. 624.

Building in the city of St. Louis, the elevator owned and operated by the Century Realty Company. She instituted action against that company to recover her damages, placing the amount at \$25,-000. The cause came on for trial and, on January 12, 1906, resulted in a verdict for her in the sum of \$5,000, judgment following on that day for that amount and costs, the judgment to bear interest at the rate of 6 per cent per annum from that date. On motion for a new trial, filed by the Century Realty Company, defendant in that case, respondent here, the circuit court set aside the verdict and judgment and ordered a new trial. From this May Travis Cooper appealed to the Supreme Court. That court, on December 23, 1909, set aside the order of the circuit court granting a new trial and reversed the judgment with directions to the circuit court to reinstate the judgment as of date January 12, 1906, the judgment to bear interest from that date. See *Cooper vs. Century Realty Co.*, 225 Mo. 709, 123 S. W. 848. The mandate of the Supreme Court was thereafter filed in the circuit court, and on January 5, 1910, that court entered up judgment in favor of May Travis Cooper and against the Century Realty Company for \$5,000, as of date January 12, 1906, that amount to bear interest at 6 per cent from that date, and also for costs and charges therein expended. Execution issued on this judgment under which, property of the Century Realty Company having been levied upon and advertised for sale, the Century Realty Company, on June 25, 1910, paid in satisfaction of the judgment the sum of \$6,753.40, that amount made up of the \$5,000 damages, \$1,337.50 interest accruing from January 12, 1906, and \$415.90 for court costs.

At the time the accident above referred to happened, the Century Realty Company held policies in two companies, both policies having first been issued in the name of the Century Building Company and others named, payable to them, "as their interests might appear," but afterwards, and before the happening of the accident, the Century Realty Company was substituted as the assured in place of the Century Building Company. Each of these policies covered the freight and passenger elevators situated in the building then owned by the Century Building Company, later by the Century Realty Company. For convenience and brevity, in speaking of the insured, we will designate it either as the Century Company, or as the Realty Company, although in the policies the former name, Century Building Company, is in fact used. It is conceded that the accident happened to May Travis Cooper while a passenger in one of the passenger elevators.

The policy issued by the Frankfort Marine, Accident & Plate Glass Insurance Company, of Frankfort-on-the-Main, Germany, hereinafter called the Frankfort Company, being the appellant herein, is designated "General Liability Policy." By it that company, in consideration of a premium stated, agreed to indemnify

the Century Company "against loss arising from legal liability for damages on account of bodily injury or death suffered by any person or persons whomsoever resulting from any and every accident of whatsoever nature or cause happening in, upon, or about the premises of the assured, or happening in, upon or about any of the seven passenger elevators and freight elevators, * * * or the machinery and appliances connected therewith and together comprising the elevator service, * * * but the liability of the company in respect to any one person suffering injury or death shall in no case exceed the sum of \$5,000, nor shall the total liability of the company in respect to any one accident resulting in injury to or the death of several persons in any event exceed the sum of \$10,000." It is expressly warranted and agreed: (1) * * * (2) That upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall give immediate notice in writing of the accident to the company and shall likewise give immediate notice of any legal proceedings instituted to enforce such claim.

"(3) That if any legal proceedings are taken to enforce a claim against the assured, covered by this policy, the company shall, *at its own cost*, undertake the defense of such legal proceedings in the name and on behalf of the assured and shall have the entire control of such defense. But if the company shall offer to pay to the assured the full amount for which the company is liable in respect to the claim sought to be enforced, it shall not be bound to defend any legal proceedings *nor be liable for any costs or expenses which the assured may incur in defending the same*. The assured at all times shall under the direction of the company, render all reasonable and necessary assistance to enable the company to effect settlements or to properly conduct a defense or to prosecute an appeal.

"(4) That the company may undertake *at its own cost* the settlement of any claim, duly reported to it as before provided, and the assured shall not, except at *his (sic) own cost*, settle any claim nor incur *any expense* without the consent of the company thereto previously given in writing; provided however that such immediate medical and surgical relief to the injured may be furnished as may be imperative at the time of the accident and reasonable expenses thus incurred shall be deemed a part of the liability of the company." (Italics ours.)

The policy of the Frankfort Company was dated June 7, 1902, was for a term of one year, but was extended June 18, 1902, for a term of twelve months, the accident occurring within this second period.

The policy issued by the Travelers' Insurance Company, of Hartford, Conn., hereinafter referred to as the Travelers, or Travelers' Insurance Company, in consideration of premiums stated, agreed to indemnify the Century Company for a period of

three years, beginning on the 11th of June, 1902, "against loss from common law or statute liability for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered within the period of this policy, by any person or persons, while in the car of the elevator mentioned in said application, or in the elevator well or hoistway of same, or while entering upon or alighting from the car," and it is set out in the policy that, "in consideration of the rate of premium at which this policy is issued, it is hereby understood and agreed that other like prior insurance shall be maintained by the assured in some other company, with like limits of liability, under said prior insurance, of \$5,000 in respect to any one person and \$10,000 in respect to any one accident causing injury to more than one person; and that this company shall only be held liable under this policy (subject to the limits of insurance therein made) for any loss sustained by the assured in excess of the amount covered by said prior insurance."

Among the conditions written in the policy and here involved, are, first, "the company's liability for an accident resulting to, or in the death of, one person is limited to \$5,000."

(14) "No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself *to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue.* No such action shall lie unless brought within the period within which a claimant might sue the assured for damages unless at the expiration of such period, there is such an action pending against assured, in which case an action may be brought against the company by the assured within thirty days after final judgment has been rendered and satisfied as above," etc. (Italics ours.)

Holding these two policies when the accident happened, the Century Company forthwith notified the two companies of it and likewise at once notified them of the bringing of the action against it by May Travis Cooper. Thereupon the Frankfort Company took charge of the action through its own attorneys and followed it through the circuit court and the Supreme Court and again in the circuit court to its termination, as hereinbefore noted. The Travelers took no active hand whatever in the management of the case, although its local attorneys kept watch of the case in its progress through the courts, but in no manner whatever interfering or controlling its management. The Frankfort, it was admitted, had been paid all attorney's fees, printing of briefs, travelling and all other expenses incident to the defense in the circuit and Supreme Courts, barring interest, if we are to class that as an "expense."

After the reversal of the judgment in the Cooper Case by the Supreme Court and the payment of that judgment in the amount before stated, the Century Realty Company demanded payment

of the amount which it had paid by way of debt, interests and costs from the two companies. The Frankfort Company, on August 6, 1910, in and through a written notice, offered and tendered to the Century Realty Company \$5,035.08, as in full settlement and satisfaction of any and all claims of whatsoever nature, which the Century Realty Company had or might thereafter have against it under the policy referred to, that is, \$5,000 on the debt and \$35.08 interest on that sum, at the rate of 6 per cent from June 25, 1910, the date the judgment was finally entered, to August 16, 1910, the date of the tender. The Realty Company refused to receive this in full settlement. The Travelers, denying any liability whatever, made no tender.

Thereupon the Century Realty Company instituted separate actions against each of the companies. On motion and by agreement of parties the two actions were consolidated by the circuit court and heard as one action before the court and a jury. At the trial the facts were practically undisputed and were developed as we have set them out. The Frankfort Company introduced no evidence, its counsel stating he was satisfied to rest upon the evidence which had been introduced by the plaintiff. The Travelers introduced evidence tending to show that it had taken no active part whatever in the management of the case of May Travis Cooper vs. The Century Realty Company, but had been satisfied to leave the defense of that case in the hands of the attorneys for the Frankfort Company; had paid no part of the expense connected with the litigation, none of which had ever been demanded of it; that its local counsel "in a way" watched the case, not as of counsel in the case, but simply watched the attorneys for the Frankfort Company try the case, watching what was going on, and reporting to their client what had happened, but they took no part in the trial, filed no pleadings nor did anything else in connection with the case, apparently satisfied, as counsel for the Frankfort modestly suggested, that the conduct of the defense was in able hands.

At the close of the testimony in the case at bar, the Frankfort Company, among other requests, asked the court to instruct the jury that under the law and the evidence in this case, the plaintiff "cannot under any circumstances, recover against the Frankfort Marine, Accident & Plate Glass Insurance Company for an amount in excess of \$5,035.08." This was refused. Of its own motion the court instructed the jury, that under the pleadings and evidence it would find and return a verdict in favor of defendant Travelers' Insurance Company, and would find and return a verdict in favor of plaintiff and against defendant Frankfort Marine, Accident & Plate Glass Insurance Company, in the sum of \$6,753.40, with interest thereon from June 25, 1910, at the rate of 6 per cent per annum. Verdict accordingly, judgment following. Saving exception to the refusal of the instruc-

tion it had asked and to the giving of the one above set out, the Frankfort Insurance Company filed its motion for a new trial. Plaintiff also filed its motion for a new trial as to Travelers' Insurance Company, treating it as filed both in the original case of the company and in the consolidated case. These motions were overruled, exceptions saved by the several parties and the causes appealed to this court.

REYNOLDS, P. J. (after stating the fact as above.)

While all three of the cases were briefed and argued together before us, the case now to be considered relates to the appeal of the Frankfort Marine, Accident & Plate Glass Insurance Company, but in the consideration of that we are compelled, in a measure, to consider the position of the Travelers' Insurance Company also, more incidentally, however, than directly.

Taking up this Frankfort Case, counsel for that company, the appellant here, make two assignments of error: First, that the court erred in giving the peremptory instruction for a verdict in favor of plaintiff and against defendant Frankfort Insurance Company, in the sum of \$6,753.40, with interest from January 25, 1910; second, that the court erred in refusing to give the instruction asked by the Frankfort Company at the close of all the evidence.

[1, 2] These two assignments of error present two theories in antithesis; if the one is right, the other is wrong. The consideration of the action of the court in refusing one instruction necessarily involves that of its action in giving the other.

In support of their assignments, learned counsel for appellant, in brief, contend that the court erred in giving the instruction directing a verdict for the respondent against the Frankfort Insurance Company, because the policy of that company, it is claimed, was "a contract of indemnity against loss," and it was not liable to the Realty Company in any amount until the Realty Company sustained a loss; that when that loss was sustained the limit of the liability of the Frankfort Company was \$5,000, the amount specifically mentioned as the limit in the policy. As necessarily following from this, it is argued, that the special agreement under which the Frankfort Company agreed to defend suits at its own cost, did not impose any liability on that company to pay interest on the judgment in excess of the limit of the policy, and that the special agreement under which the Frankfort Company agreed to defend suits at its own cost, did not impose upon that company any obligation to pay court costs incurred in any proceeding of an injured party against the Realty Company.

Counsel for appellant cite Conqueror Zinc & Lead Co. vs. *Aetna Life I. Co.*, 152 Mo. App. 332, 133 S. W. 156, in support of their contention. The decision in that case is against counsel in so far as concerns the matter of court costs, for there it is distinctly held that the insurer is responsible to the assured, in addition to the

maximum amount of indemnity provided for in the policy, for the court costs incurred and paid. It is true that it is further there held that the insurer was not liable for interest that had accrued on the judgment. That part of this decision is not determinative here. The policy involved in the Conqueror Zinc & Lead Co. Case is identical in its provisions, so far as this point is concerned, with that issued by the Travelers' Insurance Company, but it differs in its language from that of the Frankfort, and the conclusion that the *Ætna* Life Insurance Company was not liable for more than the assured had in fact paid only up to \$5,000, is reached on the ground that its policy distinctly provided: "No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within sixty days from the date of such judgment and after trial of the issue." On this provision it was held the *Ætna* Company was not liable for interest, and that plaintiff there could only recover what it had paid out up to \$5,000. Hence the Conqueror Zinc & Lead Company Case lends no aid to the contention of the appellant here, unless we are to hold that the Frankfort policy, under its wording, is susceptible of the same interpretation. That is a question which we will consider hereafter.

Counsel for the Frankfort also rely upon *Maryland Casualty Co. vs. Omaha Electric Light & Power Co.*, 157 Fed. 514, 85 C. C. A. 106; *Finley vs. United States Casualty Co.*, 113 Tenn. 592, 83 S. W. 2, 3 Ann. Cas. 962; *Davison vs. Maryland Casualty Co.*, 197 Mass. 167, 83 N. E. 407; *Puget Sound Improvement Co. vs. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 52 Wash. 124, 100 Pac. 190; *Frye vs. Bath Gas & Electric Co.*, 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500; and *Henderson vs. Maryland Casualty Co.*, 29 Pa., Super. Ct. 398, in support of the proposition that the Frankfort was liable only for the amount paid, after payment by the assured. The policies in each of these cases expressly provided, as did that in the Conqueror Zinc Company Case, and as does that of the Travelers' Insurance Company, that no action should lie against the company except to reimburse the assured "for loss actually sustained and paid by him in satisfaction of a judgment, after trial of the issue;" if not in these words, in words of like tenor. These are all the cases cited by counsel for Frankfort in support of their first proposition.

In support of their proposition that "court costs" are not to be included when they exceed the \$5,000 maximum, counsel for the Frankfort cite *Munro vs. Maryland Casualty Co.*, 48 Misc. Rep. 183, 96 N. Y. Supp. 705, and *National & Providence Worsted Mills vs. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 28 R. I. 126, 66 Atl. 58. The learned judge in the Munro Case, *supra*, reaches his conclusion mainly on the authority of *Connolly vs. Bolster*, 187 Mass. 266, 72 N. E. 981. But that case was on a policy similar in respect to those in the cases above cited and is not

in point here. Moreover, so far as he holds the insurer not liable for costs, his decision runs counter to the majority of the above cases cited by counsel themselves on the first proposition, and as to nonliability for costs, is disaffirmed by the Supreme Court of New York, Appellate Division, in Brewster vs. Empire State Surety Co., 145 App. Div. 678, 130 N. Y. Supp. 439. The Munro decision was by the Supreme Court at nisi prius, not in an appellate division. The Rhode Island decision confessedly rests on the Munro decision, *supra*, inadvertently treating it as a decision in the Appellate Division of the New York Supreme Court. The Rhode Island court, while following the Munro decision, says, as is also said in the Munro Case, that the cases are conflicting and the Rhode Island court concludes to follow the Munro Case.

Counsel for the Frankfort Company cite Finley vs. Casualty Co., *supra*. That case as well as Frye vs. Bath Gas & Electric Co., *supra*, was one in which the party injured attempted, by suit in equity, to hold the insurer liable for injuries sustained, on the ground either that the assured was bankrupt or had made a fraudulent settlement, so that plaintiffs, as employees covered by the policies, claimed a right, in equity, to subrogation to the rights of the assured, and sought to hold the insurer. The claim was denied. The policy was on like conditions as those of the Travelers in the case before us, requiring, as a prerequisite to a right of recovery, payment by the assured. After pointing out the difference between the effect of a policy which insures directly against liability and one that insures against loss or damage by reason of liability, it is said in the Finley Case, 113 Tenn. loc. cit. 598, 83 S. W. 3, 3 Ann. Cas. 962: "Under the policies of the second kind, to which the one before us belongs, the amount of the insurance does not become available until the assured has paid the loss, and is not even then available unless proper notice has been given as provided in the policy."

We do not think that these cases, and they are the only cases cited by learned counsel for the Frankfort Company, meet or cover the conditions of the policy of that company which is before us. The first and principal contracting clause is, that the Frankfort Company "does hereby agree to indemnify * * * the assured * * * against loss arising from any legal liability for damages on account of bodily injury or death * * * suffered by any person * * * resulting from any and every accident * * * happening in, or about the premises of the assured * * * but the liability of the company in respect to any one person suffering injury or death shall in no case exceed the sum of \$5,000," etc. This is all there is to it. Not a suggestion can be drawn from any of this language that the payment is only to be made by the insurer in reimbursement of what the assured shall or may have paid. On the contrary, as we understand it, it is more in the nature of "a policy which insures directly against liability, and

one that insures against loss or damage by reason of liability." *Finley vs. Casualty Co.*, *supra*. See also *Salmon Falls Bank vs. Leyser*, 116 Mo. 51, 22 S. W. 504. If it was the intention to pay only when and to the amount the assured had paid, a reference to clause 14 of the Travelers policy shows how easily that intention could have been expressed. The most that can be said for the Frankfort Company is that, failing to so write its policy, it has given one which is ambiguous and any ambiguity must be resolved against it. We conclude on this point then, that it was not within the expressed intention of this policy issued by the Frankfort, that liability to make payment to the assured should fall in only after the assured had paid whatever damage may have been awarded to the injured party.

It would seem on careful reading of the third and fourth warranty clauses, that the words "cost" and "costs" are used in a different sense in those clauses and that payment is not confined to mere taxable court costs, as that term is technically used. Thus in the third clause it is provided that, "if the company shall offer to pay to the assured the full amount for which the company is liable in respect to the claim sought to be enforced, it shall not be bound to defend any legal proceedings nor be liable for any *costs or expenses* which the assured may incur in defending the same." Surely this means that if the claim is put in suit, and the company defends, the company will then be liable for the *costs and expenses* of the action. That is a reasonable construction, at least.

In the fourth clause it is provided that the company may undertake "*at its own cost*" the settlement of any claim, and the assured shall not "except at its own cost settle any claim nor incur any *expense* without the consent of the company." Here again the terms "cost" and "expense" are used as inclusive. But grant that the meaning of the words "cost" and "costs" is ambiguous, as used, then, as before remarked, we are to apply the well settled rule that the terms and conditions employed in a policy of insurance are to be construed, if ambiguous or of doubtful meaning, most strongly against the insurer. *Grocery Co. vs. Fidelity & Guaranty Co.*, 130 Mo. App. 421, 110 S. W. 29; *Rochester Mining Co. vs. Maryland Casualty Co.*, 143 Mo. App. 555, 128 S. W. 204; *Beile vs. Travelers' Protective Ass'n* 155 Mo. App. 629, 135 S. W. 497. Construing the words "cost" and "costs," in the connection used, they have a much broader meaning than mere taxable court costs.

Construing this contract in its most favorable light in favor of the assured, and having in mind the dual meaning of the word costs, and mindful of the use of the word "expenses" and the contracts as to their payment, we come to a consideration of the question as to the liability of the Frankfort Company for payment, not only of the court costs but of interest accruing between the date of the judgment, as originally entered and the payment

thereof, payment having been suspended pending the determination of the case by the Supreme Court.

It is provided by section 7181, Revised Statutes 1909, that interest shall be allowed on all moneys due upon any judgment from the day of rendering the same until satisfaction be made by payment, at the rate of 6 per cent per annum, unless a higher rate is fixed by the contract, in which case interest shall be at the contract rate. "It is a general rule, that an action cannot be sustained for the interest of a demand after the principal has been paid; but this rule is only applicable where there had been no contract for the payment of interest. In such cases, interest could only be recovered as damages for the nonpayment of the principal debt, and therefore, where the debtor (creditor?) accept the full amount agreed to be paid, without saying anything about interest, such payment is presumed to be in full satisfaction of the demand." *Stone vs. Bennett*, 8 Mo. 41 loc. cit. 43. "Interest is a compensation for the use of money, for its detention." *Borders vs. Barber*, 81 Mo. 636, loc. cit. 646; *McDonald vs. Loewen*, 145 Mo. App. 49, loc. cit. 59, 130 S. W. 52. "Interest (on money) is the compensation which is paid by the borrower of money to the lender for its use, and generally by a debtor to his creditor in recompense for his intention of the debt." 4 Words & Phrases, 3760. "Interest is the compensation allowed by law or fixed by the parties for the use or forbearance or detention of money." Black's Law Dict. (2d Ed.) 647. At common law, "interest is the legal damages or penalty for the unjust detention of money." *Madison County vs. Bartlett*, 2 Ill. (1 Scam.) 67. "Interest is in the nature of damages for improperly withholding a debt beyond the time when it ought to be paid." *Farmer's Bank vs. Reynolds*, 4 Rand. (Va.) 186. Interest, therefore, when not awarded as a matter of contract, is given by law outside of the contract, when the contract has been breached. One promises to pay a fixed sum, at a definite time, on the happening of a named event. He does not promise to pay any larger sum; does not promise to pay interest. But if he fails to perform his contract, and is sued, he must pay, not only the fixed sum but interest on it, not by his contract, but by force of law by way of penalty for nonpayment in the amount and at the time when he should have paid it. If the debtor contests the claim, puts it in litigation, he has incurred, added, an obligation to pay interest as part of the price—part of the cost—of the litigation. So it is here. The Frankfort Company undertook at its own cost and expense, unwilling to pay for any injury to one who fell within the protection of the contract, to litigate the cause, conduct the defense, and pay the costs of the litigation. That means the expenses. That more than mere court costs is meant, is clear by the construction put upon it by the insurer itself, for as we have seen, it paid attorney's fees, printing, travelling and all other expenses connected with the defense of the case both in the circuit court and before the Supreme Court.

As we have before noted, it is said in *Munro vs. Maryland Casualty Co.*, 48 Misc. Rep. 183, loc. cit. 706, that the authorities are conflicting as to the liability for interest when the interest added to the principal exceeds the maximum sum tendered, and that the divergent views are well stated in two cases, namely, *Sanders vs. Frankfort Marine, Accident & Plate Glass Ins., Co.*, 72 N. H. 485, 57 Atl. 655, 101 Am. St. Rep. 688, and *Connolly vs. Bolster*, 187 Mass. 266, 72 N. E. 981, and that in each case the policy involved was similar to that under consideration in the *Munro Case*. As we have also noted, the policy in the latter corresponded to the policy in *Travelers Case* and contained the provision that no action should lie for any loss under the policy unless brought by the insured to reimburse him for loss actually sustained and paid by him in satisfaction of the judgment after trial of the issue, it being held that payment of the judgment was a condition precedent to liability on a policy, and the question of interest was not involved. The policy in *Sanders vs. Frankfort, etc., Ins. Co.* was issued by the same company, appellant here, and is in the same form, with this very important difference: in the policy before the Supreme Court of New Hampshire, the condition in clause 8 of the policy before the court was, "no action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue."

Curiously, also the seventh clause in this same *Frankfort Company's policy* which was before the Supreme Court of Washington, in *Puget Sound Improvement Co. vs. Frankfort, etc., Ins. Co.*, *supra*, corresponds to this eighth clause in its policy which was involved in the *Sanders Case*. No like clause or provision is in the *Frankfort policy* now before us, or has been called to our attention and we find none in the abstract of the record, which purports to set out the policies in full. Even with this eighth clause in the policy, however, it is held by the Supreme Court of New Hampshire that the insurer, if he elects to defend an action brought against the assured, is bound to protect the insured against liability at all stages of the litigation to the extent of the agreed indemnity, and he is not absolved from this obligation by the fact that the insured has not paid the amount of the judgment against him or is unable to do so by reason of insolvency, and it construes this eighth clause as applying solely to cases where the insurer denies liability for injuries which were made the subject of suit and refuses to defend.

In *Rumford Falls Paper Co. vs. Fidelity & Casualty Co.*, 92 Me. 574, 43 Atl. 503, the policy was limited to the payment of \$1,500 for the death of any one person. There it is held that the plaintiff, the assured, was entitled to recover in an action against the insurer the amount of the insurance specified in the policy, that is \$1,500,

with interest thereon from the time when the verdict was rendered in the former action and the costs recovered in that action with interest thereon from the time when they were paid.

In *Anoka Lumber Co. vs. Fidelity & Casualty Co.*, 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689, it is held that an employee having been injured while in the service of the assured and having recovered judgment thereon against the assured, the insurance company was liable upon an action against it, without the employer having first paid the judgment.

Possibly the most recent and certainly one of the most carefully considered opinions is that of *Aetna Life Ins. Co. vs. Bowling Green Gas Light Co.*, 150 Ky. 732, 150 S. W. 994, 43 L. R. A. (N. S.) 1128. In that case it was held by the Court of Appeals of Kentucky, that where the contract of insurance stipulated that the insurer would pay a fixed sum of \$5,000 as indemnity to the assured, and in addition thereto would pay "the expense of litigation," if litigation was engaged in by its direction, the words "expense of litigation," include the costs of the suit incurred by the assured, the damages awarded the claimant on an appeal by the assured, and the interest that accrued on the judgment against the assured, the argument of the court being that as the insurance company has the right to compel the assured, against his will, to engage in litigation or else forfeit the right to any part of the indemnity he had contracted for, when it elects to burden the assured for the cost and expense of an action, the provisions of the policy should be liberally construed for his benefit.

In *Saratoga Trap Rock Co. vs. Standard Accident Insurance Co.*, 143 App. Div. 852, loc. cit. 855, 128 N. Y. Supp. 822, loc. cit. 825, discussing the contract of insurance involved, it is said: "The contract embraced in the policy which the defendant issued to the plaintiff is one of indemnity merely. It is not an agreement to save harmless or to pay when liability shall be established. If the first part of the agreement was not qualified by a subsequent clause, and if the only provision contained in the policy was that the insuring company would indemnify the assured against loss by reason of liability because of an accident happening to its servant, obligation to pay would arise when judgment determining liability was entered against the insured (*Stephens vs. Pennsylvania Casualty Co.*, 135 Mich. 189, 97 N. W. 686 [3 Ann. Cas. 478]), and whatever interest accrued in an ineffectual effort to get rid of the judgment the insuring company would be bound to pay. But this broad part of the agreement is qualified by a subsequent provision of the policy that no action shall lie against the company to recover for any loss under the policy, unless it shall be brought by the assured for 'loss actually sustained and paid in money after actual trial of the issue.' This clause is a substantive part of the policy, and has the effect of changing the policy from one of indemnity when liability shall be established

to one for indemnity for money paid out on the occurrence of a particular event, to-wit, payment of the judgment obtained because of such liability." That is a very clear illustration of the difference between the two policies before us. That of the Travelers does contain this limitation: that of the Frankfort which is before us, does not. It contains no clause providing for payment only in the amount and after the assured has paid.

In Brewster vs. Empire State Surety Co., *supra*, following Saratoga Trap Rock Co. vs. Standard Accident Ins. Co., *supra*, which latter rests mainly on Creem vs. Fidelity & Casualty Co., 141 App. Div. 493, 126 N. Y. Supp. 555, it is held that interest over the maximum amount cannot be recovered. But in all these cases, the insurer was only liable "for loss actually sustained and paid by him."

Our conclusion upon the consideration of all the cases, is that the better authority leads to the result that under this form of policy issued by the Frankfort Company, the right of action of the assured did not depend upon judgment first being rendered against it and payment made by it thereof, but that its right to the indemnity accrued when the accident occurred for which it was liable; that the assured having turned over the defense of the action to the insurer and the insurer having taken up the defense of it, it is liable for all the costs and expenses incurred in that action from the date the judgment against the assured was ordered to stand until its final payment; and that the fact that interest had accrued on that in excess of the maximum \$5,000, did not exempt the insurer from the payment of that interest. It follows from this that the trial court committed no error in giving the instruction in favor of the Travelers and in refusing the instruction asked by the Frankfort Company, nor in giving that under which the jury returned a verdict against that company and in favor of the plaintiff.

In so holding we are not to be understood as holding that if the Frankfort policy before us contained the provision contained in the Travelers' policy, there would be no liability for interest on the amount of a judgment rendered, accruing after judgment and before payment, that interest bringing the amount to be paid above the maximum. That question is not here before us and is not decided.

The judgment of the circuit court in this case is affirmed.

Norton and Allen, JJ., concur.

ST. LOUIS COURT OF APPEALS.

MISSOURI.

CENTURY REALTY CO.

vs.

TRAVELERS' INS. CO.*

Appeal from St. Louis Circuit Court, Eugene McQuillin, Judge.

Action by the Century Realty Company against the Travelers' Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Dawson & Garvin, of St. Louis, for Appellant.
Watts, Dines, Gentry & Lee, of St. Louis, for Respondent.**REYNOLDS, P. J.**

The proposition involved in this case and its determination rests upon the same facts and principles as those involved in *Century Realty Co. vs. Frankfort, etc., Insurance Co.*, 161 S. W. 624. For the reasons stated in the opinion in that case, the judgment of the circuit court is affirmed.

Nortoni and Allen, JJ., concur.

* Decision rendered, Dec. 2, 1913. Rehearing denied, Dec. 16, 1913.
161 S. W. Rep. 630.

ST. LOUIS COURT OF APPEALS.

MISSOURI.

CENTURY REALTY CO.

*vs.*FRANKFORT MARINE, ACCIDENT & PLATE GLASS INS. CO.
*ET AL.**

Appeal from St. Louis Circuit Court; Eugene McQuillin, Judge.

Action by the Century Realty Company against the Frankfort Marine, Accident & Plate Glass Insurance Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Dawson & Garvin, of St. Louis, for Appellant.

Watts, Dines, Gentry & Lee and Seddon & Holland, all of St. Louis, for Respondents.

* Decision rendered, Dec. 16, 1913. 161 S. W. Rep. 631.

REYNOLDS, P. J.

The proposition involved in this case and its determination rests upon the same facts and principles as those involved in *Century Realty Co. vs. Frankfort, etc., Insurance Co.*, 161 S. W. 624. For the reasons stated in that case, the judgment of the circuit court is affirmed.

Norton and Allen, JJ., concur.



**SUPREME COURT OF NEW YORK.
APPELLATE DIVISION. FOURTH DEPARTMENT.**

L. BLACK CO.

vs.

LONDON GUARANTEE & ACCIDENT CO., LIMITED.*

1. INSURANCE—CREDIT INSURANCE—BREACH OF WARRANTY—SUFFICIENCY OF EVIDENCE.

Evidence, in an action on a policy of credit insurance, wherein the defense was that a false statement was made in the application, as to losses previously incurred, held not to show that insured knew, prior to making the application, that a debtor who had made an assignment to him for the benefit of creditors would not be able to pay his creditors in full.

(For other cases, see *Insurance*, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

2. APPEAL AND ERROR—FINDINGS—PRESUMPTION.

Where, in an action on a credit insurance policy, both parties move for a directed verdict at the close of the evidence, and the court directs a verdict for plaintiff, it will be presumed on appeal that the court found that plaintiff had no notice, at the time of making his application, of a probable loss not mentioned in the application, where such finding is necessary to support the directed verdict.

(For other cases, see *Appeal and Error*, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.)

3. INSURANCE—CREDIT INSURANCE—BURDEN OF PROOF—“LOSS”—“INSOLVENCY.”

A credit insurance policy insuring “against actual loss, such loss to occur through the insolvency of debtors as herein defined,” made a part of its terms the application, which provided that any material misstatements or omissions should avoid the policy and stated the losses for a preceding period. The policy also defined insolvency as “the making of an assignment or deed of trust by a debtor for the benefit of creditors” and provided for the adjustment of partial losses. Held, that the word “losses” as used in the application, was not equivalent to

* Decision rendered, Nov. 19, 1913. 144 N. Y. Supp. 424.

"insolvency"; and hence, in an action on the policy wherein the defense was a breach of warranty, the burden was on defendant to establish, not only the insolvency of a debtor not mentioned in the application, but to prove that plaintiff at the time of making the application knew that he would ultimately suffer a loss upon such debtor's account.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.)

(For other definitions, see Words and Phrases, vol. 5, pp. 4232-4237; vol. 4, pp. 3647-3655; vol. 8, p. 7687.)

4. INSURANCE—CREDIT INSURANCE—APPLICATION—CONSTRUCTION.

Where an application for credit insurance did not in terms refer to the policy, the policy could not be looked to in construing the application, since, while a warranty must be strictly true, its scope will not be extended beyond the fair import of its language.

(For other cases, see Insurance, Cent. Dig. §§ 308-311; Dec. Dig. § 151.)

5. INSURANCE—APPLICATION—SUFFICIENCY—DEFENSE.

Where an application for credit insurance, made on forms prepared by the insurer, requires the applicant to state its losses during specified periods, and the statement made is incomplete and ambiguous, and the insurer issues the policy without demanding fuller information, such defects in the application will not be available as a defense to a subsequent action on the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1028-1031; Dec. Dig. § 389.)

6. INSURANCE—APPLICATION—CONSTRUCTION.

To avoid a forfeiture of insurance, equivocal answers in the insured's application will be construed most strongly against the insurer.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

7. INSURANCE—CREDIT INSURANCE—APPLICATION—SUFFICIENCY.

Where a printed statement in an application for credit insurance, stating that the applicant knew nothing detrimental to the credit of any customer "which would affect his policy except as follows," was stricken from the application before it was signed, the insured could presume that no information was required as to doubtful accounts; and hence his failure to give such information did not invalidate the policy.

(For other cases, see Insurance, Dec. Dig. § 284.)

Merrell, J., dissenting.

Appeal from Trial Term, Monroe County.

Action by the L. Black Company against the London Guarantee & Accident Company, Limited. From judgment for plaintiff and denial of new trial, defendant appeals. Affirmed.

Argued before Kruse, P. J., and Robson, Foote, Lambert, and Merrell, JJ.

Louis L. Waters and King, Waters & Page, all of Syracuse, for Appellant.

Hiram Wood and Werner & Harris, all of Rochester, for Respondent.

ROBSON, J.

The cause of an action upon which plaintiff had its judgment is founded upon a contract of credit insurance, made by the defendant, as insurer, with plaintiff, as the insured. The policy of insurance issued by defendant to plaintiff is set forth in full in the plaintiff's complaint, and its issuance to plaintiff by defendant substantially in the form set out in the complaint is admitted by defendant in its answer. The principal defense interposed was the affirmative one of an alleged breach of warranty on the part of plaintiff by reason of a statement, contained in plaintiff's application for the policy of the amount of losses sustained by it from July 1, 1909, to June 16, 1910, the date of the application, which statement defendant alleged was false in that plaintiff's losses during that period were much greater than plaintiff stated them to have been.

The policy issued upon plaintiff's application provides that the defendant will insure plaintiff during the period specified therein "against actual loss, * * * such loss to occur through the insolvency of debtors as herein defined." A copy of the application was in terms made part of the policy, which also contains the following provision:—

"Consideration: The statements and warranties made in the application of the insured are the basis of, and are a part of, this policy. Any material misstatements therein, or omissions therefrom, * * * shall void this policy and the premium paid shall be forfeited."

The application itself was in the form of separately numbered statements, the truth of only one of which is questioned. It appears, so far as material, as follows in the application:—

"As a basis of this policy and of any renewal thereof or of any new policy the undersigned warrants the following statement of sales, losses, etc., to be true: (9) Our gross sales and losses after deducting actual recoveries from debtors and our collections on credit insurance have been each year during the past five years as follows:—

Term.	For the Year Ending	
	Gross Sales.	Losses.
* * *	* * *	* * *
July 1, '09 to June 30, '10.	1910 about \$630,000.	\$8,959.05 from July 1, 1909, to date, showing amount owing as accounts stand to- day."

[1] On the trial defendant sought to establish its affirmative defense of breach of warranty by showing that the statement of the amount of plaintiff's losses during the period from July 1,

1909, to June 16, 1910, was false in that a claim in its favor against F. W. Edwards, one of its customers, for the sum of \$9,667.63 should have been included in its statement of losses and added to the amount of losses set forth in the above statement; it being claimed that Edwards was then insolvent to the knowledge of plaintiff. It appeared that Edwards, who was then owing plaintiff upwards of \$10,000 on January 3, 1909, made a deed of trust to plaintiff, which was accepted by it, by which he transferred property to it for the purpose of converting it into money and, after deduction of expenses, exemptions, etc., distributing the proceeds thereof to such of the creditors of Edwards, including plaintiff, as should become parties to the trust agreement and agree to discharge the said Edwards from all indebtedness to them, whether the payment made should be in full or in part of such indebtedness; the surplus, if any, after such payments to be returned to Edwards. The property transferred by the trust deed is thus described therein:—

"All of the singular (sic) and goods, chattels, effects, claims, demands, and bills receivable, including books of account, and other evidences of indebtedness, together with all collateral belonging or pertaining thereto, owned by the said party of the first part (Edwards) or in which said party of the first part has any interest, marked Exhibit A, hereto annexed and made a part hereof."

It may be observed that it does not appear either in the deed of trust or by direct evidence that at the time the deed of trust was given all of the property of Edwards was thereby transferred to plaintiff, or that plaintiff knew prior to making its application to defendant for insurance that Edwards's creditors would not be paid in full. Indeed, there is direct evidence that notification of the fact that there might be a loss on the Edwards account was not received by plaintiff until some days after the application was made.

[2] If it was a question of fact in the case whether plaintiff had notice of a probable loss on the Edwards account prior to making its application for this insurance, the evidence would support a finding, which, if necessary to support the direction of a verdict, the court must be presumed to have made, both parties having moved for a directed verdict, that such notice had not been received.

[3] Appellant, however, claims that the meaning of the word "losses," as used in the application, is defined by the contract itself, and points to a provision of the policy defining "insolvency" as the agreed equivalent for the term "loss" as used in the contract of insurance. So far as material it is as follows:—

"Definition of Insolvency: For the purposes of this policy any one of the following occurrences shall constitute the insolvency of a debtor: * * * (11) The making of an assignment

or deed of trust by a debtor for the benefit of creditors either general or with preferences."

But while the making of such an assignment or deed of trust by a debtor may be *prima facie* evidence of a loss to the insured covered by the policy, if otherwise within its terms, yet it is clear that the fact of insolvency alone is not conclusive as to the extent of the loss of insured which the policy covers, as appears by another provision of the policy entitled "adjustment," wherein it is stated that:—

"From each covered gross loss there shall be deducted in whole or pro rata, as the indebtedness is covered in whole or in part, all amounts collected or made secure, whether as payments, dividends, goods returned or replevied (when such replevied goods are in the undisputed possession of the insured) or otherwise realized," etc.

It is apparent that it is the loss, adjusted as the policy provides, that the defendant thereby insured plaintiff against, for the policy provides for insurance only as "against actual loss, * * * such loss to occur through the insolvency of debtors as herein defined * * * and to be proven under the terms, conditions and limitations of this policy." Even in the policy itself, therefore, the term "loss" is not the equivalent of, nor is it fixed in amount by, the actual indebtedness of a debtor of the insured at the time the insolvency occurs. The word "loss," therefore, within the terms of the policy itself, would seem to mean the net loss due to insolvency of the debtor after application on the claim of such salvage as had been made thereon up to the date of adjustment of loss. In this view of the meaning of the word "loss," as used in the application, it would be incumbent upon defendant, in establishing its defense of breach of warranty, to show that plaintiff should have known that there would probably be an ultimate loss upon the Edwards account at the time of making its application for insurance.

[4] But, even conceding that an insolvency of a debtor is synonymous with a loss covered by the policy as the words are used therein, it by no means follows that the word "losses" has anything more than its usual meaning as it is used in the application for insurance. There is no reference in the application to the definition of losses or insolvency as they are contained in the policy itself. While the policy refers to the application as a part of it, the application does not in terms refer to the form of the policy to be issued for an explanation or definition of its terms. Applying the usual rules for the interpretation and construction of such contracts, it would appear that the amount of losses, which plaintiff was required to state, were those which it had actually to its knowledge sustained during the specified periods. Of course plaintiff warranted the truth of the statement made. But, while a warranty must be strictly true, its scope will not be

extended beyond the fair import of its language. *Higgins vs. Phoenix Mutual Life Ins. Co.*, 74 N. Y. 6; *Dineen vs. General Accident Ins. Co.*, 126 App. Div. 167, 110 N. Y. Supp. 344.

[5] The form of the statements in the application was prepared by the defendant to be filled out by the applicant. In filling out this form plaintiff was required to state its losses during specified periods. The statement, which it is claimed was false, is, as above stated, that its losses were "\$8,959.05 from July 1, 1909, to date, showing amount owing as accounts stand to-day." This statement of losses as being a certain amount, limited as the statement of amount of losses is by the clause "showing amount owing as accounts stand to-day," is perhaps not entirely clear in its expression of the meaning of the applicant. It might well be held to express the idea that it was a statement of losses as the accounts of customers appeared on the plaintiff's books in which it had entered as losses such accounts of customers as it had knowledge at the time were or would be uncollectible. As stated above, plaintiff did not receive information of a probable loss on the Edwards account until several days after the application for insurance was made. Plaintiff might well be excused from considering or treating this account, as it stood at the time of making the application, as a loss. If the statement it made as to its losses is to be treated as incomplete or ambiguous in its terms, then, if defendant was not satisfied with it, fuller information should have been required. The law applicable to such a situation is well stated in Richards on Insurance Law (3d Ed.) § 113:—

[6] "Questions unanswered or partially answered. If a question in the application is not answered at all, or if the answer is not false in any respect but upon its face is only incomplete, there is no breach of warranty, provided the insurer accepts the application without objection, since, if not satisfied, the company should demand fuller information. So also, to avoid forfeiture, equivocal answers are construed most strongly against the company, but, notwithstanding this, the applicant must answer in good faith and not attempt to evade, conceal, or mislead."

In support of the judgment we may assume that the court found that this statement was made by plaintiff in good faith and without attempt to evade, conceal, or mislead. There is no evidence of any such purpose; nor can any such inference be properly drawn. That the form of application was prepared by defendant with a view of differentiating the required statement of actual losses incurred by the applicant from probable losses from doubtful accounts appears in the form itself.

[7] One of the separate statements appearing in its printed form of application is as follows:—

"(6) We do not know of anything detrimental to the credit or standing of any customer or prospective customer, which would affect this policy, except as follows:"

This statement was stricken from the application before it was signed by plaintiff. Not having been required to make any statement on this subject, plaintiff might well have inferred that no information as to doubtful accounts was required. In view of the admissions in defendant's answer and its concessions of fact made at the trial, it does not seem necessary to discuss the other assignments of error which are urged on this appeal.

The judgment and order should be affirmed, with costs. All concur, except Foote, J., not voting, and Merrell, J., who dissents.

MERRELL, J.

Fair dealing should have prompted the applicant for credit insurance to disclose, not conceal, the fact that it held the deed of trust from its customer, which under the terms of the policy then before the parties was defined as constituting insolvency. Failure to do so was not, I think, inadvertent, and constituted such a breach of warranty as should preclude any recovery by plaintiff.



**WEAVER vs. NEW JERSEY FIDELITY & PLATE GLASS
INS. CO.***

(Supreme Court of Colorado.)

1. INSURANCE—POLICY—LIABILITY.

An insurer, issuing a policy covering loss from breakage of glass in a building of insured, hereby agreed to indemnify insured for loss by a breakage occasioned by the wrongful act of a third person.

(For other cases, see Insurance, Dec. Dig. § 424.)

**2. INSURANCE—LOSS OCCASIONED BY WRONGFUL ACT OF
THIRD PERSON—RECOVERY BY INSURED—EFFECT.**

Generally a recovery by insured from a third person causing a loss of the property insured releases the insurer from liability.

(For other cases, see Insurance, Cent. Dig. § 1499; Dec. Dig. § 603.)

**3. INSURANCE—LOSS OCCASIONED BY WRONGFUL ACT OF
THIRD PERSON—RECOVERY BY INSURED—EFFECT.**

Where an insurer undertakes to indemnify insured, with full knowledge of an antecedent settlement between him and a third person causing the injury, the insurer is a mere volunteer, and cannot recover of insured under the subrogation clause of the contract.

(For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.)

* Decision rendered, Dec. 1, 1913. 136 Pac. Rep. 1180.

4. PLEADING—MOTION FOR JUDGMENT.

Where the answer tendered a good defense to the complaint stating a cause of action, the court could not render judgment for plaintiff on the pleadings.

(For other cases, see *Pleading*, Cent. Dig. §§ 1048-1051; Dec. Dig. § 343.)

Error to District Court, City and County of Denver; James H. Teller, Judge.

Action by the New Jersey Fidelity & Plate Glass Insurance Company against Edward E. Weaver. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Garwood & Garwood and Jacob V. Schaetzel, all of Denver, for Plaintiff in Error.

William J. Miles, of Denver, for Defendant in Error.

**INDIANA & O. LIVE STOCK INS. CO. *vs.* KEININGHAM.***

(Court of Civil Appeals of Texas. Dallas.)

1. INSURANCE—ISSUANCE OF POLICY—DUTY TO READ.

Insured is ordinarily bound by the terms of the policy, whether he reads it or not.

(For other cases, see *Insurance*, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

2. INSURANCE—ISSUANCE OF POLICY—CONDITIONS.

Where live stock insurance policies and applications therefor did not provide that the policy was in force only while the horse was in a certain town and insured requested a similar renewal policy, and the application therefor did not contain such limitation, insured could assume without reading it that the policy issued did not contain the provisions so limiting the company's liability.

(For other cases, see *Insurance*, Cent. Dig. §§ 276-291; Dec. Dig. § 145.)

3. INSURANCE—CONSTRUCTION OF CONTRACT—CONFLICTING PROVISIONS—POLICY AND APPLICATION.

Where an application for a live stock insurance policy recited that the policy should be "based entirely upon" the answers in the application, and the policy provided that the application was a "part of the policy" and a warranty by assured, if the policy provided that the horse should be insured only while it remained in a certain county, while the application did not so limit the company's liability, the application would control.

(For other cases, see *Insurance*, Cent. Dig. §§ 308-311; Dec. Dig. § 151.)

4. INSURANCE—CONSTRUCTION OF CONTRACT.

Every doubt must be resolved against the company in case of conflicting and inconsistent provisions in an insurance policy.

(For other cases, see *Insurance*, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

* Decision rendered, Nov. 1, 1913. Rehearing denied, Dec. 13, 1913.
161 S. W. Rep. 384.

Error from Ellis County Court; J. C. Lumpkins, Judge.

Action by J. D. Keiningham against the Indiana & Ohio Live Stock Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. Thompson and John S. Patterson, both of Dallas, for Plaintiff in Error.

Will Hancock, W. H. Fears, and Supple & Harding, all of Waxahachie, for Defendant in Error.



STATE *vs.* MASSACHUSETTS BONDING & INS. CO.*

(Supreme Court of Kansas.)

1. PRINCIPAL AND SURETY—SURETY COMPANIES—CONSTRUCTION OF BOND.

In an action upon a bond written by a corporation engaged in the business of furnishing surety for compensation, the rules of strict construction which usually control in cases of accommodation sureties will not be applied, and if the bond is fairly open to two constructions, one of which will uphold and the other defeat the claim of the insured, that which is most favorable to the insured will be adopted. But where there is no ambiguity, the plain intention of the parties cannot be disregarded or nullified by construction.

(For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.)

2. STATES—PUBLIC BUILDING CONTRACT—CONSTRUCTION OF SURETY BOND—DEFENSES—“O. K.”

A contract entered into between the State of Kansas and a construction company for the erection of a building provided that the state architect should make a certified estimate each month of the value of all labor and material used that month in the construction, and that the state would pay to the contractor ninety per cent thereof; that no payments should be made except on his certificate that the work for which the payment was due had been properly done. A surety company guaranteed the faithful performance of the contract on the part of the construction company, and by reference the contract was made a part of the bond. The bond also contained the following provision: “If the payments are not made promptly in accordance to contract, this bond becomes null and void.” During the progress of the work the construction company abandoned its contract and the state had the work completed by another contractor. In an action on the bond it is held:

- That the rights of the parties are not affected by the fact that the architect was a state officer. In making the estimates he was not acting as a state architect but as an individual.
- The parties agreed upon the architect as the person upon whose judgment and decision with respect to the character, amount, and value

* Decision rendered, Dec. 6, 1913. 136 Pac. Rep. 905. Syllabus by the Court.

of the work payments were to be made. In the absence of fraud or mistake, they are bound by his judgment and decision.

- (c) Upon the facts stated in the opinion, if the architect in making the certificates acted in good faith in relying upon information from others as to the extent of the work and the amount of labor and material that had been used, the terms of the contract in this respect were satisfied.
- (d) Some of the certificates were prepared by other persons and were indorsed by the architect, "O. K." The employment of the abbreviation or symbol of "O. K." in such a transaction is in accordance with common usage and was a sufficient certificate of the correctness of the estimate upon which it was endorsed.
- (e) The state is not estopped from maintaining an action to recover upon the bond because before making the payments it failed to take the precaution to see that the estimates were true and correct, nor by the fact that the estimates certified by the architect included labor and material which had not in fact been used in the construction of the work, but which had been furnished when the estimates were made.

(For other cases, see States, Cent. Dig. § 98; Dec. Dig. § 101.)

(For other definitions, see Words and Phrases, vol. 5, p. 4871; vol. 8, p. 7735.)

Appeal from District Court, Shawnee County.

Action by the State against the Massachusetts Bonding & Insurance Company, a corporation. Judgment for plaintiff, and defendant appeals. Modified.

McClintock & Quaint, of Topeka, McCune, Harding, Brown & Murphy, of Kansas City, Mo., and Chas. Blood Smith, of Topeka, for Appellant.
J. S. Dawson, Atty. Gen., and S. N. Hawkes, Asst. Atty. Gen., for the State.

LIFE.**UNITED STATES SUPREME COURT.****OCTOBER TERM.****ÆTNA LIFE INSURANCE COMPANY, Petitioner,****vs.****JOHN T. MOORE, Administrator of John A. Salgue, Deceased.*****INSURANCE — UNTRUE STATEMENTS IN APPLICATION — GOOD FAITH OF INSURED.**

1. Variations from the truth in the statements made by the insured in his application for life insurance, which are by the policy expressly made the basis of the insurance contract, will, under the construction given to Ga. Code, §§ 2479, 2480, by the courts of that state, avoid the policy if such untruths are such as change the nature, extent, or character of the risk, whether they are made in good faith, without knowledge of their untruth, or are made fraudulently or wilfully.

(For other cases, see Insurance, Cent. Dig. §§ 540, 549; Dec. Dig. § 256.)

APPEAL AND ERROR—PREJUDICIAL ERROR—REFUSING INSTRUCTION.

2. Error in refusing to instruct the jury in an action on a policy of life insurance that untrue answers in the application, if material, avoid the policy, regardless of the good faith of the insured calls for the reversal of a judgment entered on a general verdict against the insurance company, where the evidence as to the untruthfulness of the answers is conflicting, since the verdict being general, it is not possible to say what view the jury took of the conflict, or that it was necessary to resolve it in view of the charge of the court or how they would have resolved it if the instructions requested had been given.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.)

INSURANCE—UNTRUE ANSWER IN APPLICATION—APPLICATION FOR OTHER INSURANCE.

3. The answer "no" to the question in the insured's application for life insurance whether any proposal or application to insure his life was pending in another company, or, if made, had not been granted, calling for particulars and the names of all such companies, associations, or agents, is such a variation from the truth as changes the nature, extent, and character of the risk, and therefore, under Ga. Code, §§ 2479, 2480, avoids a policy which makes the statements in the application the basis of the insurance contract, where, having made an application for insurance to the local agent of another company, whose medical examiner refused to pass him, the insured had withdrawn the application on the advice of such agent before it reached the insurance company.

(For other cases, see Insurance, Cent. Dig. § 679; Dec. Dig. § 300.)

* Argued Nov. 3, 1913. Decided Dec. 22, 1913. 34 Sup. C. Rep. 186.

INSURANCE—ESTOPPEL OF INSURER—KNOWLEDGE OF LOCAL AGENT.

4. Knowledge of the actual conditions and circumstances by the local agent who prepared the application for a policy of life insurance will not estop the insurance company from enforcing a condition rendering the policy void if material untrue statements are made in such application, where it was expressly agreed between the parties that "no statement or declaration made to any agent, examiner, or other person, and not contained in" the application, should "be taken or construed as having been made to or brought to the notice or knowledge of" the company, "or as charging it with any liability by reason thereof," and the insured specifically expressed his understanding to be that the company or one or more of its executive officers and no other person, could grant insurance or make any agreement binding upon the company.

(For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. § 378.)

COURTS—RULES OF DECISION—FOLLOWING DECISIONS OF STATE COURTS.

5. The question as to the effect of the knowledge of the local agent upon the right of a life insurance company to insist upon a condition rendering the policy void if material untrue statements are made in the application is one of general jurisprudence, upon which the Federal courts are not controlled by the decisions of state courts.

(For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969-971; Dec. Dig. § 365.)

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of Georgia in favor of plaintiff in an action on a policy of life insurance. Reversed and remanded for a new trial.

The facts are stated in the opinion.

Messrs. A. L. Miller, M. D. Jones, George S. Jones, Walter Defore, Wallace Miller, and Chas. H. Hall, Jr., for Petitioner.

Messrs. Minter Wimberly, Jesse Harris, and Alexander Akerman, for Respondent.

MCKENNA, J., delivered the opinion of the court.

Action on a life insurance policy for \$6,000, issued upon the life of John A. Salgue, the intestate of respondent. It was tried to a jury, resulting in a verdict and judgment for respondent. The judgment was affirmed on writ of error to the Circuit Court of Appeals by a *per curiam* opinion. This certiorari was then granted.

The questions in the case are based on certain statements made by Salgue, which, it is contended by petitioner (herein called the insurance company), became a part of the policy and constituted warranties.

The following are the material provisions of the policy and the application: —

"This policy of insurance witnesseth: That the *Ætna Life Insurance Company*, in consideration of the statements, answers, and warranties contained in or indorsed upon the application for

this policy, which application is copied herein and made a part of this contract, and in further consideration of the annual premium *.*.* hereby insures the life of John A. Salgue *.*.*.

"This policy is issued and accepted subject to the conditions, provisions, and benefits printed on the reverse of this page, which are hereby referred to and made a part hereof. *.*.*

"Conditions, provisions, and benefits which are made a part of this policy:—

"Section 1. This policy shall not take effect until the first premium hereon shall have been actually paid during the lifetime and good health of the insured. *.*.*

"Section 7. All agreements by said company are signed by one of its executive officers. No agent or other person not an executive officer can alter or waive any of the conditions of this policy, or make any agreement binding upon said company."

Copy of the application:—

"Being desirous of insuring my life with the *Aetna Insurance Company*, I do hereby declare and warrant that I am in good health, of sound body and mind, and that the following statements signed by me are full, correct and true; and that I have no knowledge or information of any disease, infirmity, or circumstance not stated in this application which may render insurance on my life more hazardous than if such disease, infirmity, or circumstance had never existed; and I do hereby agree that the declarations and warranties herein made, and the answers to the following questions, together with those signed by me on the second page of this application, shall be the basis and form part of the contract (or policy) between me and the said company, and that if the same be in any respect untrue, said policy shall be void; and I further agree that the insurance hereby applied for shall not be binding upon said company until a policy has been issued, nor until the amount of premium as stated therein has been received by said company, or its authorized agent, during my lifetime and good health, and a receipt given therefor, signed by an executive officer of said company; and I further agree that no statement or declaration made to any agent, examiner, or other person, and not contained in this application, shall be taken or considered as having been made to or brought to the notice or knowledge of said company, or as charging it with any liability by reason thereof; and I understand that all policies and agreements made by the said *Aetna Life Insurance Company* are signed by one or more of its executive officers, and that no other person can grant insurance or make any agreement binding upon said company."

The application also contained questions addressed to the insured by the examining physician, and the answers by him, among others, as follows:—

"14. What are the names and residences of all the physicians

whom you have personally employed or consulted during the last five years?"

Answer: "Dr. James T. Ross, Macon, Ga."

"16. Has any proposal or application to insure your life been made to any company, association, or agent on which a policy of insurance is now pending? Or has any such proposal or application ever been made for which insurance has not been granted, or on which a policy or certificate of insurance was not issued in full amount, and of the same kind as applied for? If so, state particulars and the names of all such companies, associations, or agents."

Answer: "None."

"19. Has any physician expressed an unfavorable opinion upon your life with reference to life insurance?"

Answer: "No."

"21. Have you ever had any of the following diseases? Answer 'yes' or 'no' opposite each. If 'yes,' state the date, duration, and severity of illness. * * * Disease of the heart?"

Answer: "No."

"23. Are you subject to dyspepsia, dysentery, or diarrhoea?"

Answer: "No."

"24. Have you had during the last seven years any disease or severe sickness? If so, state the particulars of each case and the names of the attending physicians."

Answer: "No."

There was discussion between Salgue and the examining physician in regard to the condition of Salgue's heart. His first statement was that he did not have heart disease though he had been told he had. The physician explained to him the symptoms of the disease, and he replied that he did not have any of them and never had been treated for heart trouble. He had, he further said, consulted two doctors, Little and Winchester, and one of them told him he had heart disease "and scared him so." The other told him that he did not have any signs of it. And the recollection of the physician was that Salgue referred to Dr. Ross as having treated him for something several years previously. At the end of the discussion the physician put down the answer "No." He also reported that Salgue's respiration was "full, easy, and free. O. K., and that 'auscultation' did not 'indicate enlargement or disease of the heart of any kind.'"

There was testimony to the effect that about June 15, 1905, and prior to the application to the *Aetna*, Salgue applied to the local agent of the Penn Mutual Insurance Company at Macon for a policy of \$6,000. The company's medical examiner refused to pass him, telling him that he had heart disease, and advising him to see his family physician, Dr. McAfee. Salgue consulted Dr. McAfee, and was informed by him that he had heart disease.

The contentions of the insurance company are based (1) upon a request for the direction of a verdict in its favor; (2) the denial of requests for special instructions. We may confine our consideration to the special requests.

There was controversy as to whether Salgue had heart disease. We have seen the various opinions of the examining physicians, Salgue was a strong man physically and his strength was illustrated by instances. At one of his examinations he easily picked up and removed a large box of melons without any effect on his heart action. An effort of strength on another occasion was immediately detrimental, causing an aneurism which progressively developed and produced a rupture of the blood vessel and his death. By the advice of his physician he had quit work and had gone to a resort called Indian Springs. He remained there about ten days, and on his way home died suddenly on the cars.

It is not necessary to give at length the charges requested. They embrace the propositions (1) that the application and its statements, warranties, and covenants became part of the contract of insurance, and that any variation from them whereby the nature, extent, or character of the risk was changed, would affect the policy, whether the statements were made by the applicant in good faith, not knowing they were untrue, or made wilfully or fraudulently. And so also as to the answers to the questions put to Salgue as to his health, freedom from heart disease, the physicians he had consulted, the applications for insurance which he had made which were rejected or not accepted. (2) Under the terms of the policy the application constituted part of it, the answers to the questions were covenanted and warranted, and Salgue was bound thereby without regard to his good faith in making them; or that they were representations material to the risk by which he was bound without regard to his good faith, and that therefore the answers, if untrue, would make the policy void. (3) The provisions of the policy that no statement or declaration made to an agent, examiner, or any other person, and not contained in the application, shall be taken or construed as having been made to or brought to the knowledge of the company, or as charging it with any liability by reason thereof, was binding on Salgue. So also the limitations on the powers of the agents and of what may have been said to them or by them. And further, that if the answers in the application were incorrect, it was Salgue's duty to report them as incorrect to the company, and, failing to do so, he was presumed to have accepted his policy upon the faith of them. It was therefore immaterial what may have been said by or to the agent or to the medical examiner which was not reduced to writing and presented to the officers of the company at the home office.

The charge of the court was very long,—too long even to attempt to condense. It was antithetical to the special requests

made by the insurance company. Applying certain general principles which it expressed, the court said:—

"To make them distinctly applicable to your duty, you are instructed that you must determine from all the facts, first, did Salgue make a misrepresentation or concealment of a fact of which he had knowledge? If he did not, the defense on this point must fail. Second, if he did, was such misrepresentation or concealment so material that it would have influenced one or both of the defendants not to issue the policy of insurance upon the respective applications? And third, in connection with this your inquiry will be, if such material misrepresentation or concealment as would have caused the defendants or either of them to withhold insurance was made, was it by Salgue wilfully or fraudulently done? In the absence of wilful or fraudulent misrepresentation or concealment of a material fact, the policy stands good and the insurance company must pay what it promised to pay by its policy, when it accepted the premium of the applicant."

We may note here that Salgue declared in his application that he was "in good health;" that the statements made by him were "full, correct and true;" and that he had no knowledge of "any disease, infirmity, or circumstance" which might "render insurance on his life more hazardous than if such disease, infirmity, or circumstance had never existed." He also agreed that "the declarations and warranties" therein made, and the answers to the questions, "should be the basis and form part of the contract (or policy)" between him and the company, "and that if the same be in any respect untrue" the policy should be "void."

The policy is conceded to be a Georgia contract. The character of its covenants, therefore, depends upon the law of that state, declared in § 2479 of its Code, as follows:—

"Application, good faith.—Every application for insurance must be made in the utmost good faith, and the representations contained in such application are considered as covenanted to be true by the applicant. Any variation by which the nature or extent or character of the risk is changed will void the policy."†

†[Sec. 2480. Effect of misrepresentation.—Any verbal or written representations of facts by the assured to induce the acceptance of the risk, if material must be true, or the policy is void. If, however, the party has no knowledge, but states on the representation of others, bona fide, and so informs the insurer, the falsity of the information does not void the policy.

[Sec. 2481. Concealment.—A failure to state a material fact, if not done fraudulently, does not void; but the wilful concealment of a fact which would enhance the risk will void the policy.

[Sec. 2483. Wilful misrepresentation voids policy.—Wilful mis-

representation by the assured or his agent, as to the interest of the assured, or as to other insurance, or as to any other material inquiry made, will void the policy.

[Sec. 2499. Law of fire insurance applicable.—The principles before stated as to fire insurance, wherever applicable, are equally the law of life insurance.]

But who is to decide—the court or jury—whether a variation be of the quality described? We have seen how explicit the policy is, and this court in *Jeffries vs. Economical Mut. L. Ins. Co.* 22 Wall. 47, 22 L. ed. 833, and *Aetna L. Ins. Co. vs. France*, 91 U. S. 510, 23 L. ed. 401, held that the parties to the contract may make the inquiries and answers material, and that therefore their materiality is not open to be tried by a jury.

These cases recognize the right of the insurer and the insured to make their own contract and determine for themselves what representations shall be material.

How far has this simple rule and the right of the parties been changed by the Georgia Code? In *German-American Mut. Life Ass'n vs. Farley*, 102 Ga. 720, 733, 29 S. E. 615, it was decided to be the established law of that state that mere immaterial matters, though incorporated in an application for insurance and declared to be warranties, do not avoid the policy, and that this was so imperatively the law of the state under the provisions of the Code that the parties could not contract to make immaterial matter material. The court, however, said: "Of course, what is in any degree material should be allowed its due effect; but the absolutely immaterial should count for nothing."

In *Supreme Conclave, K. D. vs. Wood*, 120 Ga. 328, 47 S. E. 940, the Code again came up for construction and the statements of the insured were declared to be representations, not warranties, and that it was the purpose of the Code to get away from what the court denominated the "finer distinctions and strained constructions" of the cases. It was therefore held that under the Code of the state "a policy cannot now be avoided upon the ground of the falsity of the representation, though warranted, unless the representation be material and the variations from truth be such as to change the nature, extent, or character of the risk." But the court further held that if the representations have such variation, although the applicant may have made them in good faith, not knowing that they were untrue, if they were made the basis of the contract, such contract is void. "It is therefore immaterial," the court declared, "whether the warrantor acted in good faith in making them."

The facts of the case were very much like those of the case at bar. The applicant represented himself, in answer to a question, as not having heart disease. Of this representation the court said that it "was certainly a material one, and doubtless the company acted upon it." And further: "It is scarcely conceivable

that the company would have issued the policy if the applicant had answered that he was or had been afflicted with heart disease, or even if he had answered doubtfully. We think that if the answer made was untrue, the plaintiff below cannot recover."

The judgment in the case was reversed upon the ground, among others not necessary to be considered, of error in the instruction of the court, "that if Wood had heart disease and did not know it, the failure on his part to disclose it could not avoid the policy." There was dispute as to the fact, but the court did not pass upon it, remitting it as a question for the jury to decide at the next trial.

In *Southern L. Ins. Co. vs. Wilkinson*, 53 Ga. 535, 549, 550, after commenting on the difference the cases made between warranties and representations, the peremptory character of the former, their truth being the only question, the effect of the latter being determined by their materiality to the risk, the court said the Code of the state determined the character of the statements. The court quoted § 2479, which we have given, and § 2480, which provides that "any verbal or written representation of facts by the assured to induce the acceptance of the risk, if material, must be true or the policy is void," and said that "the proper construction is that if there be any variation in them from what is true, whereby the nature or extent or character of the risk is changed, the policy, if it makes them the basis of the contract of assurance, will be void, and that this will be so whether they are or are not wilfully or fraudulently made."

It is, however, contended by respondent that the questions asked in the application were truthfully answered, or, at any rate, whether they were truthfully answered was a question for the jury. And it is insisted that the answers of Salgue in regard to other insurance and the action thereon by other companies were correct.

But granting that the truthfulness of the answers was a question for the jury, the testimony was conflicting; and, as the verdict was general, it is not possible to say what view the jury took of the conflict, or that it was necessary to resolve it in view of the charge of the court, or how they would have resolved it if instructions requested by the insurance company had been given.

We think there was error also in refusing other requests for instructions. We have seen questions were addressed to Salgue as to the names and residence of the physicians he had employed or consulted, and whether any physician had expressed an unfavorable opinion upon his life with reference to life insurance, and also whether any proposal or application to insure his life was pending in another company, or, if made, had not been granted. To the first question he gave the name of only one physician. There was testimony that he had consulted others.

To the second question he answered, "No." There was testimony that the answer was untruthful. To the third question he answered, "None." The truthfulness of the answer is asserted notwithstanding it appeared from the testimony that he had made application to the Penn Mutual Company, which application had not been granted. The evidence was that the medical examiner had refused to pass him because he was of opinion that he, Salgue, had heart disease, and so reported to the agent of the company. The agent told Salgue if he, Salgue, would pay the doctor's fee to the company, he, the agent, would withdraw the application before it reached the company, and that Salgue "could answer in the future that he had never been rejected by any company;" and the agent testified "that it is customary entirely with agents to stop examinations that way."

It is contended by respondent that this testimony shows that Salgue's application to the Penn Mutual was not rejected, but was withdrawn; and, besides, whether it was rejected or withdrawn was a question for the jury. We are unable to concur with either contention. The question was a very broad one. It was whether any proposal or application had been made for which insurance had not been granted, and particulars were asked for, "and the names of all such companies, associations, or agents." Regarding the sense of the question—indeed, if not its letter—the answer was untruthful. The question certainly called for something more than an absolute negative. Its purpose was to ascertain the conduct of Salgue with reference to life insurance in order to judge of him as a risk. If it had been answered according to the facts, the company would have received information of circumstances certainly material for it to consider.

This conclusion is supported as we have seen, by the cited Georgia cases, and is not opposed by *Moulor vs. American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466, or *Phoenix Mut. L. Ins. Co. vs. Raddin*, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. Rep. 500. In the Moulor Case it was held that the statements made by an applicant would be considered as representations rather than warranties, the policy leaving it in doubt which they were contracted to be, and that they could not be considered either by the company or the applicant as covering diseases which the latter was not conscious of having. It was said that what the company desired of the applicant was the utmost good faith toward it, making "full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation, or concealment of facts with which the company ought to be made acquainted; and that by so doing, and only by so doing, would he be deemed to have made 'fair and true answers.'"

In *Phoenix Mut. L. Ins. Co. vs. Raddin*, there is a clear definition of principles. Answers to questions propounded to an applicant, it was held, will be considered representations unless clearly in-

tended by both parties to be warranties, as to which substantial truth in everything material to the risk is all that is required of the applicant. And it was decided: "Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts; at least, when statements regarding them are required by the insurers as part of the basis of the contract. * * * Where an answer of the applicant to a direct question of the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application."

The medical examiner, as we have seen, put down the answer "No" to the question asked Salgue as to whether he had heart disease, after being informed by Salgue, that he, Salgue, had been told by physicians that his heart was affected. It appears from the evidence that the other answers of Salgue in his application were written down by the agent of the company; and there is testimony for and against the fact that Salgue informed the agent of the opinion entertained of him by his physicians, and that he also informed the agent of other applications for insurance. It is hence contended that the agent, not Salgue, is responsible for the positive character of the answers, and that the insurance company is estopped by this action of the agent and his knowledge of the actual conditions and circumstances. It is therefore further contended that the case comes within the principle of the cases which establish that where the agent of the company prepares the application or makes representations to the insured as to the character and effect of the statements of the application, he will be regarded in so doing as the agent of the company, and not the agent of the insured. Among the cases cited to sustain the principle are the following in this court: *Union Mut. L. Ins. Co. vs. Wilkinson*, 13 Wall. 222, 20 L. ed. 617; *American L. Ins. Co. vs. Mahone*, 21 Wall. 152, 22 L. ed. 593; *New Jersey Mut. L. Ins. Co. vs. Baker*, 94 U. S. 610, 24 L. ed. 268; *Continental L. Ins. Co. vs. Chamberlain*, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87; *German-American Mut. Life Ass'n vs. Farley*, *supra*, is also cited, and being a Georgia case, its authority is especially urged.

There are, however, later cases which enforce the provisions of a policy, and we have seen that it was agreed in the policy under review "that no statement or declaration made to any agent, examiner, or other person, and not contained in" the application, should "be taken or construed as having been made to or brought to the notice or knowledge of" the company, "or as charging it with any liability by reason thereof." And he, Salgue, expressed his understanding to be that the company or one or more of its executive officers, and no other person, could grant insurance or make any agreement binding upon the company.

The competency of applicants for insurance to make such agree-

ments, and that they are binding when made, is decided by Northern Assur. Co. vs. Grand View Bldg. Ass'n, 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; Northern Assur. Co. vs. Grand View Bldg. Ass'n, 203 U. S. 106, 51 L. ed. 109, 27 Sup. Ct. Rep. 27; Penman vs. St. Paul F. & M. Ins. Co. 216 U. S. 311, 54 L. ed. 493, 30 Sup. Ct. Rep. 312.

To the contention that German-American Mut. Life Ass'n vs. Farley is determinative, we answer that the principle which it is cited to support is one of general jurisprudence, and therefore the case is not controlling. Kuhn vs. Fairmont Coal Co. 215 U. S. 349, 54 L. ed. 228, 30 Sup. Ct. Rep. 140.

This case was consolidated by the court against the objection of the insurance company, with the trial of the case of the same plaintiff against the Prudential Insurance Company. This action of the court was based on § 921 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 685), which provides that "causes of a like nature, or relative to the same questions," may be consolidated "when it appears reasonable to do so." The action of the court is assigned as error. We doubt if it was reasonable to consolidate the cases. We need not, however, pass definitely on that point, as we direct a new trial on other grounds.

Judgment reversed and cause remanded to the District Court for a new trial.

Mr. Justice Pitney dissents.



UNITED STATES SUPREME COURT.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, Petitioner,

vs.

JOHN T. MOORE, Administrator of John Andrew Salgue, Deceased.*

INSURANCE — UNTRUE STATEMENTS IN APPLICATION —
GOOD FAITH OF INSURED.

1. Variations from the truth in the statements made by the insured in his application for life insurance, which are by the policy expressly made the basis of the insurance contract, will, under the construction given to Ga. Code, §§ 2479, 2480, by the courts of that state, avoid the policy if such untruths are such as change the nature, extent, or character of the risk, whether they are made in good faith, without knowledge of their untruth, or are made fraudulently or wilfully.

(For other cases, see Insurance, Cent. Dig. §§ 540, 549; Dec. Dig. § 256.)

* Argued Nov. 6, 1913. Decided Dec. 22, 1913. 34 Sup. C. Rep. 191.

INSURANCE—UNTRUE ANSWERS OF INSURED—OTHER APPLICATIONS FOR INSURANCE.

2. Untrue answers material to the risk which, under Ga. Code, §§ 2479, 2480, as construed by the courts of that state, avoid the policy, were given by the insured in his application made a part of the insurance contract, where he answered "no" to the question whether "any company or companies and when," and mentioned but one other company in answer to the question whether application for insurance was then pending in any other company, while in fact he then had applications in two other companies pending, and where, having made an application for insurance to the local agent of another company whose medical examiner refused to pass him, he had withdrawn such application upon the advice of the agent, before it reached the insurance company.

(For other cases, see Insurance, Cent. Dig. § 679; Dec. Dig. § 300.)

INSURANCE—ESTOPPEL OF INSURER—KNOWLEDGE OF AGENT.

3. No knowledge of the local agent who prepared the application for a policy of life insurance can estop the insurance company from insisting that the policy is void because of material untrue statements in such application, which is made a part of the insurance contract, where the policy provides that "no agent has power in behalf of the company to make or modify this or any contract of insurance extending the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise, or making or receiving any presentation or information."

(For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. § 378.)

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of Georgia in favor of plaintiff in an action on a policy of life insurance. Reversed and remanded for a new trial.

The facts are stated in the opinion.

Messrs. Eugene R. Black, Sanders McDaniel, and Edward D. Duffield, for Petitioner.

Messrs. Minter Wimberly, Alexander Akerman, and Jesse Harris, for Respondent.

McKENNA, J., delivered the opinion of the court.

Action upon a policy of insurance for \$5,000, issued by petitioner, herein called the insurance company, upon the life of John Andrew Salgue. It was consolidated and tried with the case against the *Ætna* Company, and resulted in a verdict for the amount of the policy, upon which judgment was entered. It was affirmed by the circuit court of appeals and the case was then brought here. Though consolidated in the district court with the other case, it is here upon a separate record and submitted upon a separate argument. It, however, involves some of the same fundamental questions.

Salgue, in his application for insurance, declared and warranted that he was in good health and that all the statements and answers to the questions put to him were complete and true, and

that the declaration should constitute a part of the contract of insurance applied for. He further agreed that the policy should not take effect until the same should be issued and delivered by the company while his health was in the same condition as described in the application.

Certain provisions were made part of the policy, among others, that "no agent has power in behalf of the company to make or modify this or any contract of insurance, extending the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise, or making or receiving any presentation or information."

On the medical examination he declared as follows: "I hereby warrant that the answers to these questions are true and correct, and that they shall form a part of the contract of insurance applied for." The questions in the application and the answers thereto were as follows:—

"Has any company or association ever declined to grant insurance on your life, or issue a policy of a different kind, or for a sum less than that applied for?"

Answer: "No."

"If 'yes,' give name of company or companies and when."

(No answer was given to this question.)

"Is application for insurance on your life pending at this time in any other company; if so, give the name of the company."

Answer: "Yes; Provident Savings Life."

"When were you last attended by a physician?"

Answer: "Early spring of 1905."

"For what complaint?"

Answer: "Bilious fever, two days."

"Have you ever had any serious illness?"

Answer: "No."

"Are you in good health?"

Answer: "Yes."

There was testimony in the case tending to show that these answers were untrue; that he had chronic acid gastritis and heart disease, and that other applications for insurance were pending, and others not granted. And it is urged that, the answers to the questions above stated being in the negative, he omitted to answer other questions which were material to be answered in order to make his statement complete and truthful; that therefore his omission to answer amounted to a fraudulent concealment.

Error is assigned on the ruling of the court refusing to direct a verdict for the insurance company and refusing certain special instructions.

The policy is conceded to be a Georgia contract, and it is contended that the warranties contained in the application were all material to the risk, and that they were all broken (1) because the

evidence showed that the answers to the questions were false, thereby avoiding the policy; (2) the policy was not delivered to Salgue while he was in good health, that being a condition precedent to its taking effect; and (3) the policy was void by reason of incomplete and untruthful answers. This, it is urged, is the effect of the Georgia law, which, while it modifies the imperative character of statements by an applicant for insurance as warranties, yet provides that any variation from the facts stated "by which the nature or extent or character of the risk is changed will avoid the policy." Code of Georgia, § 2479.

The insurance company, therefore, to sustain its contention that a verdict should have been directed for it, must establish that the representations were material to the risk, and that they were untrue. Whether they were untrue is a question of fact; and as the proposition of law which the insurance company relies upon is exhibited by the special request, we shall pass to the consideration of the latter. It presents the question of the materiality of Salgue's statements to the risk as one of law. The court submitted it to the jury as a question of fact, and made as elements of decision Salgue's motive, his good or bad faith, his mistake or fraud in making the representations. This we think, is the sense conveyed by the charge of the Court, as we said in *Aetna L. Ins. Co. vs. Moore*, just decided [231 U. S. 54, ante, 186, 34 Sup. Ct. Rep. 186], notwithstanding there are here and there qualifying words and a distinction made between misrepresentation of facts and the concealment of them. A few excerpts from the charge will illustrate this. After defining a warranty the court said: "On the other hand representations are statements made to give information to the insurer, and otherwise induce it to enter into the insurance contract, and unless *distinctly material, and made with fraudulent purpose* (italics ours) do not avoid the policy. * * * Substantial integrity of conduct on the part of both insurer and insured is the prime object the law seeks to obtain. * * * The law of Georgia, while requiring that every application for insurance must be made in the utmost good faith, and that representations are considered as covenanted to be true, otherwise the policy will be voided, also provides that a failure to state a material fact, if not done fraudulently, does not void the policy. On the other hand, the wilful and fraudulent concealment of such a fact which would enhance the risk of the company will have the effect to void it. What is here stated to be true of wilful concealment is also true of wilful misrepresentation by the applicant to his agent as to any material inquiry made. It follows that under the law of Georgia, a misrepresentation in statement or a concealment of fact must first be material, or must be wilfully or fraudulently made in order to annul the insurance."

After further explanation, the court said:—

"These are the general principles. To make them distinctly applicable to your duty, you are instructed that you must determine from all the facts, first, did Salgue make a misrepresentation or concealment of a fact of which he had knowledge? If he did not the defense on this point must fail. Second, if he did, was such misrepresentation or concealment so material that it would have influenced one or both of the defendants not to issue the policy of insurance upon the respective applications? And, third, in connection with this your inquiry will be, if such a material misrepresentation or concealment as would have caused the defendants or either of them to withhold insurance was made, was it by Salgue wilfully or fraudulently done? In the absence of wilful or fraudulent misrepresentation or concealment of a material fact, the policy stands good and the insurance company must pay what it promised to pay by its policy, when it accepted the premium of the applicant."

This being the charge of the court, wherein did it militate against the special request, which is as follows:—

"The defendant, The Prudential Insurance Company of America, requests the court to charge as follows:—

"Question 4-B of the application of said John A. Salgue to the said The Prudential Insurance Company of America is as follows: 'Has any company or association ever declined to grant insurance on your life, or issued a policy of a different kind, or for a sum less than applied for? (Answer "Yes" or "No.")' The answer to this question is 'No.'

"The defendant insists that this answer is false, and says that the said Salgue, in the month of June, 1905, prior to the time of making this application, applied to the Penn Mutual Life Insurance Company for a policy, and was declined. If you believe from the evidence that the said Salgue made application to Anderson Clark, the agent for the Penn Mutual Life Insurance Company, for insurance, and that this application was signed by the said Salgue, and that this application was handed by the said Anderson Clark, as agent for the Penn Mutual Insurance Company, to Dr. Little, examiner for the said Penn Mutual Company, for examination, and that Dr. Little, as said examiner, examined the said Salgue, and stated to the said Salgue that he had heart trouble, and that for this reason he could not pass him, then I charge you that this would amount to a declination by the Penn Mutual Life Insurance Company of the application for insurance made to it by the said Salgue, and if you believe from the evidence that such application was made and that such declination was made, then I charge you that the answer of Salgue to this question was false, and that it was warranted to be true, and that it was as to a material matter which would tend to change the nature, extent, and character of the risk assumed, and that in this event plaintiff could not recover."

It is contended that the instruction was "legal and pertinent" to the issue, and was not incorporated in the charge of the court. The court, we have seen, did not incorporate the instruction in its charge, and that the instruction was legal and pertinent to the issue between the parties is shown by the opinion in the *Ætna Case*.

The instruction based on the facts stated was peremptory of the right of the insurance company to recover. But respondent contends that the requirement was either void, or that the agent of the company wrote down and reported the answer, knowing the facts, and therefore the company is estopped to dispute the correctness of the answer or its completeness. There was testimony in the case upon which the contention could be based. But the case was not submitted to the jury in that view. This phase of the case, as its other phases, was made to turn upon the good faith of Salgue, not upon the materiality of the fact or the action of the agent of the insurance company. The court stated to the jury that the contention of the insurance company was that the transaction with the Penn Mutual showed a rejection of Salgue's application by that company, "to be determined by the court as a matter of law." With the contention the court said it was unable to agree, "and leaves the question to the jury, it being a mixed question of law and fact."

The testimony in regard to the application to the Penn Mutual is the same as in the *Ætna Case*. We need not repeat it. It may be that it cannot be literally said that any company or association had rejected an application by Salgue. If that had been the question, and regarding sense, rather than form, it could be contended that the answer was untruthful. But the question asked Salgue was broader. He was asked "if any company or association ever declined to grant insurance" on his life, and the further question was put: "If so, give the name of the company or companies," to which he gave no answer. He was also asked, "Is application for life insurance on your life pending at this time in any other company; if so, give the name of the company?" To the latter question he answered, "Yes; Provident Savings Life." At that time he had an application pending with the Sun Life Insurance Company of Canada. The answers were, therefore, not true, and we think that they were material to the risk within the meaning of the Georgia Code. *Ætna L. Ins. Co. vs. Moore*.

It is contended here, as in the *Ætna Case*, that the company is estopped by the knowledge of the agent, and the same cases are cited as were cited there. We answer here as we answered there, that the terms of the policy constituted the contract of the parties and precluded a variation of them by the agent. We may, however, observe that Salgue did not inform the medical examiner in this case, as he did in the *Ætna Case*, that he was told he had heart disease. In other words, he made no communication to the examiner which modified in any way the positive character of his answers to the questions put to him. The

testimony is conflicting as to the information he gave to the agent of the company, who, the evidence shows, prepared the application.

We think, therefore, that the court erred in refusing the special request.

It is also contended, as it was in the *Aetna* Case, that the District Court erred in consolidating the causes, and it must be admitted that petitioner here has more ground of complaint of the ruling than the *Aetna* Company. We are, however, not required to pass upon the contention, though, as we said in the other case, there are grounds for it.

Judgment reversed and cause remanded to the District Court for a new trial.

Mr. Justice Pitney dissents.

UNITED STATES CIRCUIT COURT OF APPEALS.
EIGHTH CIRCUIT.

BLAKE

vs.

OLD COLONY LIFE INS. CO. (No. 3,722.)*

IN S U R A N C E—FOREIGN INSURANCE COMPANIES—DEPOSIT
OF SECURITIES—TRUST.

A deposit of securities by a foreign life insurance company with the Superintendent of Insurance of a state, required by him as a condition to the granting of a license to do business in the state, but not required by the statutes of the state, did not create a trust in favor of domestic policyholders of the company, where there was no agreement to that effect and no evidence that such was the intention of the company, and on withdrawal from the state the company is entitled to a redelivery of the securities.

(For other cases, see Insurance, Cent. Dig. § 23; Dec. Dig. § 21.)

In Error to the Circuit Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Action at law by the Old Colony Life Insurance Company against Frank Blake. Judgment for plaintiff, and defendant brings error. Affirmed.

Elliott W. Major, Atty. Gen., and Campbell Cummings, Asst. Atty. Gen., for Plaintiff in Error.

Silver & Dumm, of Jefferson City, Mo., for Defendant in Error.

Before Hook and Smith, Circuit Judges.

* Decision rendered, Nov. 19, 1913. 209 Fed. Rep. 309.

SMITH, C. J.

The state of Missouri has an insurance department, the chief officer of which is designated as the "Superintendent of the Insurance Department." Mr. Robert G. Yates held this office in the years 1903 and 1904. He was then succeeded by W. D. Vandiver who in turn was succeeded by the plaintiff in error, hereafter called the defendant, Frank Blake. In 1903 and 1904 Mr. Joseph B. Reynolds was the actuary of the department. The laws of Missouri have at all times here material contemplated the organization of: (1) Life and accident companies on the joint-stock or mutual plan, or the two combined; (2) assessment insurance companies; (3) companies on the stipulated premium plan; and others. This was an action in replevin by the Old Colony Life Insurance Company, hereafter called the plaintiff, against Frank Blake, to recover three notes and trust deeds given to secure the same. The parties filed a stipulation in writing, waiving a jury as provided in section 649 of the Revised Statutes (U. S. Comp. St. 1901, p. 525). The court made special findings of fact substantially as follows:—

This is an action of replevin for securities, amounting to \$5,000, deposited by the Cosmopolitan Life Association on or about October 17, 1903, with the insurance department of the state of Missouri. The defendant Blake is now superintendent of that department, and is now in possession and custody of such securities. The Cosmopolitan Life Insurance Association was a foreign corporation, organized under the laws of the state of Illinois, and made application to transact business in the state of Missouri on the stipulated premium plan, under article 4 of chapter 119 of the Revised Statutes of the state of Missouri of 1899. On making application to the insurance department of the state of Missouri it was informed by the then Superintendent of Insurance that it was the ruling of the insurance department of the state of Missouri that before a license under the stipulated premium law could be issued it would be necessary for the Cosmopolitan Association to deposit \$5,000 in money or securities with the department. The construction placed upon the law by the department was that all companies, foreign or domestic, must make such deposit before authority to do business in the state could properly be issued. The actuary of the department, Mr. Joseph B. Reynolds, also informed the company that it would be required to deposit \$5,000 before securing a license in the state, under the stipulated premium law, for the reason that it had no such deposit in the state of Illinois, and that the Missouri department would require that the deposit, if not made there, must be made in Missouri, in order that it might be placed on the same basis as domestic companies under the same law. No requirement existed under the laws of Illinois for making said deposit with the Illinois insurance department and that department would not receive such a deposit. The Cosmo-

politan Association at once arranged to make, and did make the required deposit with the Missouri insurance department, and thereupon the license to do business in Missouri was granted to it by that department. Contemporaneously with this application on the part of the Cosmopolitan Association, that company had undertaken to reinsure the business of a fraternal insurance company, known as the Royal Tribe of Joseph, then doing business in the state of Missouri, and the reinsurance agreement entered into between the two organizations was submitted to the insurance department of the state of Missouri for approval. That approval was granted upon the making of the deposit and the issuance of the certificate of authority or license as aforesaid, and thereupon the Cosmopolitan Association took over the business of the fraternal organization under said reinsurance agreement. This certificate of authority or license was renewed for one year upon the 1st of March, 1904, and again upon the 12th day of May, 1905, for a period terminating March 1, 1906, and the Cosmopolitan Association continued to do business in Missouri until the 1st day of January, 1906, when it withdrew from the state and requested that its certificate of authority and license be canceled. Meantime the securities that it originally deposited, and which are the subject-matter of this suit, remained on deposit with the insurance department, and were left there without demand by the Cosmopolitan Association after its withdrawal from the state. Subsequently,

~~and on~~ or about the 9th day of September, 1909, an agreement was ~~entered~~ into between the Cosmopolitan Association and the Old Colony Life Insurance Company, a corporation organized under the laws of the state of Illinois, plaintiff herein, whereby plaintiff purchased all the assets of the Cosmopolitan Association of every character and description, and plaintiff agreed to assume all liabilities of said association for death claims, and all other liabilities of such association shown by an attached exhibit. Plaintiff further agreed that holders of stipulated premium policies in said Cosmopolitan Association should be entitled to receive, in exchange for their policies in said association, the plaintiff's "whole life nonparticipating policy" at the same rates of premium they had been paying to said Cosmopolitan Association, plus the increase in said rates necessary to conform to their attained ages; and on the same day the Cosmopolitan Association for valuable considerations, chief among which was the assumption of the risks of said association by plaintiff, transferred, conveyed, and assigned to the plaintiff, by writing duly executed, all the moneys, securities, books, records, office furniture, bills receivable, and all other personal or mixed property or effects belonging to said Cosmopolitan Association. Thereafter plaintiff by letter made demand upon the defendant as Insurance Superintendent for the recognition of plaintiff as the owner and assignee of the funds in his hands, and defendant refused until all of the outstanding policy-

holders who might be held to have the right to proceed against the deposit were satisfied. Coupled with this demand plaintiff asserted that it did not desire to withdraw this deposit from the insurance department of the state of Missouri until all the policies that were formerly issued by the Cosmopolitan Association were fully satisfied. This was done before the plaintiff company had investigated the nature of the deposit and the requirements of the law under which it was made. Meanwhile a number of suits were filed in Missouri against the plaintiff company, by persons holding policies in the Cosmopolitan Association issued while it was doing business in this state. Judgments were afterwards secured against the Cosmopolitan Association, aggregating about \$2,000 and some other small claims are pending. Steps were taken under the Missouri statutes to subject this deposit to the payment of these judgments. The plaintiff made demand upon the defendant for these securities, which demand was refused. This suit followed. The Cosmopolitan Association is no longer doing business, and has no assets out of which claims may be satisfied. The plaintiff now has assumed the obligations of the Cosmopolitan Association to the extent hereinabove set forth. It is doing a legal reserve life insurance business in the state of Illinois, and perhaps elsewhere, but not in Missouri. Its headquarters are in the city of Chicago, and it has on deposit with the insurance department of Illinois an aggregate of \$221,000. The laws of Illinois do not know stipulated premium plan companies as defined in the laws of Missouri, and no deposits are there required or authorized from such companies, either foreign or domestic. It is conceded that there is no question of retaliatory law present in this case. At the time of the making of the deposit nothing was said or done with reference thereto by the representatives of the Cosmopolitan Association or of the state, except as hereinabove set forth, but the following certificate or license was issued:—

"It is hereby certified that the Cosmopolitan Life Insurance Association of Freeport, Illinois, has complied with the requirements of the insurance laws of this state and is hereby authorized, subject to the provisions thereof, to do business of life insurance on the stipulated premium plan in the state of Missouri, until the first day of March, 1904."

Upon these facts the court found and held:—

(1) The insurance laws of Missouri do not require a deposit with the insurance department by foreign insurance companies doing business in that state on the stipulated premium plan.

(2) Plaintiff is the owner of the securities sued for, and is not estopped from demanding the return of such securities from the defendant.

(3) That no trust was created vesting in the Insurance Commissioner, either as an official or as an individual, the right to hold

these securities for the exclusive benefit of the Missouri policy-holders of the Cosmopolitan Association or otherwise.

(4) That the plaintiff is therefore entitled to recover.

The defendant requested the court to make the following declarations:—

"If the court finds from the evidence that Robert G. Yates, on the 17th day of October, 1903, was the duly appointed, qualified, and acting Superintendent of Insurance of the state of Missouri, and on said date the Cosmopolitan Life Insurance Association was an insurance corporation organized and doing business under the laws of the state of Illinois, and on said date said Cosmopolitan Company made application through its managing officer for a certificate of authority to transact life insurance business in the state on the 'stipulated premium plan,' and as a prerequisite, among other things, was required to make a deposit of \$5,000 as an insurance fund, and on said date did deposit said \$5,000 with said Superintendent of Insurance of Missouri, in trust for the benefit of the policyholders of said company, and that from year to year until 1906, continued said deposit with the insurance department of Missouri, for the same purpose, and that thereupon said Cosmopolitan Company proceeded to do an insurance business in this state on the stipulated premium plan, and wrote policies and collected the premiums therefor, and that said policies were still subsisting and in force when the plaintiff purchased and took an assignment of the benefits of said Cosmopolitan Company in October, 1909, and that losses accrued on said policies in this state, and the same have not been paid by said Cosmopolitan Company or plaintiff, when this suit was brought, nor up to this time, then plaintiff cannot recover in this action, and it will not avail plaintiff that such deposits may not have been required by the law of Missouri, and the plea of ultra vires will not avail plaintiff."

And again:—

"The counsel for the Cosmopolitan having had the option to make the deposit to obtain the license, and having elected so to do, cannot be heard to say it was 'involuntary,' and thereby reap all the benefits of a license and the increase of its business. The Cosmopolitan had no absolute right to a license, and could not have compelled the issuance to it of a license. There was no duress or fraud in the transaction.

"The superintendent construed the statute to require him to take the deposit, and the company accepted that construction, and both sides executed the agreement, and neither will be heard now to plead ultra vires, or that it was involuntary as to policyholders who have suffered losses in this state and are unpaid."

The court refused to make either of said declarations of law, and to each refusal the defendant at the time excepted.

The statutes of Missouri contain no express provision that foreign companies doing business on the stipulated premium plan

shall make any deposit of securities before being authorized to do business. The insurance department did not so understand when it took these securities. Mr. A. C. Murray testifies that the Missouri Insurance Department first required that \$5,000 in securities be deposited with the Illinois Insurance Department, and it was only after the Illinois department had refused to take the deposit that the demand was substituted that the securities be deposited with the Missouri department. Mr. Joseph B. Reynolds, the actuary of the insurance department of Missouri, says:—

"They were told that they would be required to deposit \$5,000 before securing the license in the state under the stipulated premium law, for the reason that they had no such deposit in Illinois, and that the Missouri department would require that the deposit, if not made there, must be made in Missouri, in order that they might be placed on the same basis as domestic companies are under the same law. That was not only what they were told, but was the rule of the department at the time."

It is quite clear that the demand for a deposit in Missouri was upon the broad equitable ground thus announced, and there was no claim that any Missouri statute required it; else why the offer to waive it, if the deposit was made in Illinois?

In his argument the defendant relies upon what is now section 6985 of the Revised Statutes of Missouri of 1909.

"When any such corporation, company or association shall desire to relinquish its business in this state, the superintendent shall, on application of such corporation under oath of its president or principal officer and secretary or actuary, give notice of such intention at least twice in a newspaper of general circulation published at the state capital. After such publication he shall deliver up to said corporation the securities, or any portion thereof, held by him belonging to such corporation upon being satisfied that all the debts and liabilities of every kind are paid or provided for."

It is contended that the intent of the law must govern, and that a provision for the delivering up of securities would be foolish if no securities were required to be deposited. This is true, but section 6965, R. S. 1909, provides for the deposit of \$5,000 in securities by domestic companies, and section 6983, R. S. 1909, contains this provision with reference to foreign companies:—

"When any state, territory or foreign country shall impose any obligations upon any such corporation of this state, or their agents transacting business in such other state, territory or foreign country, the like obligations are hereby imposed upon similar corporations of such other state, territory or foreign country, their agents or representatives transacting business in this state; and such corporation, company, association or society of such other state, territory or foreign country, and its agents and representatives shall pay all licenses, fees or penalties to, and make deposits with the Superintendent of Insurance imposed by the laws of such

other state, territory or foreign country upon any corporation of this state doing business therein; and in case of failure to pay the same, the superintendent shall refuse the certificate of authority herein provided for or cancel such certificate, if one shall have been previously issued."

Manifestly the provision in 6985 has reference to domestic companies, and to the only securities required to be deposited by foreign companies, and they are the ones referred to in section 6985 as to be returned. The Legislature could have required foreign companies to make a deposit in trust, and could have defined who its beneficiaries should be, and of what the trust should consist, but it did not do so. It follows that the securities were deposited without authority of law. The question of the existence of a trust and of the estoppel of the plaintiff to deny such trust have been argued together, and will be so considered.

Ignoring any question as to the statute of frauds of Missouri, a trust in personality may be established by parol evidence, but such evidence must be clear and convincing, not doubtful, uncertain, or contradictory. *Allen vs. Withrow*, 110 U. S. 119, 129, 3 Sup. Ct. 517, 28 L. ed. 90. Who was the beneficiary of the supposed trust, and what were its terms?

It appears that the laws of Missouri with reference to domestic stipulated premium companies provided in section 6965, R. S. 1909, that:—

"Every corporation incorporating or reincorporating under the provisions of this article shall deposit with the Superintendent of Insurance such securities as are required by law to be deposited by insurance companies the sum of five thousand dollars before it shall commence business. Said five thousand dollars shall be a part of the insurance fund and an asset of the corporation. The securities deposited with the insurance department pursuant to this section shall be held by the superintendent in trust for the benefit and protection of and as security for the policyholders of such corporation, their legal representatives and beneficiaries."

There is nothing on the face of this statute that limits the benefits of the securities to domestic policyholders, and the insurance department was satisfied with a deposit in Illinois, which would certainly not have been for the exclusive benefit of policyholders in Missouri. These securities were deposited and a certificate to do business in Missouri was issued, which made no reference to the securities. There was no declaration of trust, and nothing to indicate why or for whose security they were deposited. Mr. Yates, the then Superintendent of Insurance of Missouri, testified:—

"They put up the money with the understanding—I don't know whether it was ever stated to him or not, but it was my understanding, and the reason why we demanded that was for the benefit of the policyholders which they had then, or might have in

the future, in the state of Missouri, if they had any at that time."

There was nothing said between the parties as to who were the beneficiaries of the supposed trust. The insurance department thought it was to secure the Missouri policyholders, but there is nothing to indicate the Cosmopolitan Company so understood it, or understood the beneficiaries of the trust were different from what they would have been if the money had been deposited in Illinois. If we could ascertain who the beneficiaries were, whether all policyholders or only the Missouri policyholders, what policies did it secure? The holders of membership in the Royal Tribe of Joseph had no security, and there was no agreement they should have any. Was the trust simply for the benefit of insurers on the stipulated premium plan, or did it include the members of the former fraternal insurance society? We do not know and there is not a syllable of evidence tending to enlighten us. It is evident that if there was a trust, no individual has shown that he or his claim was secured by the trust by clear or convincing, or any other kind of evidence and the whole matter remains doubtful and uncertain, and the same is true of the claim of estoppel which is not specially pleaded.

The case in this court of Illinois Life Insurance Co. vs. Tully, 174 Fed. 355, 98 C. C. A. 259, is quite like the case at bar, and disposes of many of the questions argued here.

Reliance is placed upon Boston & Albany R. Co. vs. Mercantile Trust & Deposit Co. of Baltimore, 82 Md. 560, 34 Atl. 778, 38 L. R. A. 97; Clark vs. Callahan, 105 Md. loc. cit. 614, 615, 66 Atl. 618, 10 L. R. A. (N. S.) 616, 12 Ann. Cas. 162; Coyne vs. Supreme Conclave, 106 Md. 54, 66 Atl. 704, 14 Ann. Cas. 870; Ruhe vs. Ruhe, 113 Md. 595, 77 Atl. 797.

Special reliance is placed upon the first case, and upon the following language there used:—

"In determining whether or not a trust has been created, courts will take into consideration the situation and relations of the parties, the character of the property, and the purpose which the settler had in view in making the declaration. No technical terms or expressions are needed."

But the defendant ignores that immediately following this language the court further said:—

"It is sufficient if the language used shows that the settler intended to create a trust, and clearly points out the property, the beneficiary, and the disposition to be made of the property."

In this case the requirement that the settler clearly point out the beneficiary and the disposition to be made of the property is wholly ignored. In that case the treasurer of state, in his receipt for the security, expressly stated:—

"That said securities are now held by me, as such treasurer aforesaid, in my official capacity, on deposit as a guaranty for the payment of the policies of insurance issued by said company."

And in his separate schedule he referred to the—"stocks and other securities * * * held by me in trust for the policyholders of the American Casualty Insurance and Security Company of Baltimore City."

Clearly there is no analogy between that case and this, and the same is true of the other cases cited.

Sufficient has been said to indicate that the defendant was not entitled to the declarations of law asked.

No error appears, and the judgment is affirmed.



SUPREME COURT OF NEW YORK.

APPELLATE TERM. FIRST DEPARTMENT.

MANNHEIMER

vs.

INDEPENDENT ORDER OF AHAWAS ISRAEL.*

INSURANCE—POLICY—PROOF OF AUTHORITY—SUFFICIENCY

That the beneficiary of an insurance policy, by reason of the insured having disappeared several years previously, was unable to make actual proof of death in the way specified in the policy, did not bar her right to recover; the provision of the policy relative to the method of proof of death being merely a declaration of the course to be followed under ordinary circumstances.

(~~For~~ other cases, see *Insurance*, Cent. Dig. §§ 1963-1965; Dec. Dig. § 789.)

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Jennie Mannheimer against the Independent Order of Ahawas Israel. From an order setting aside a verdict for plaintiff, she appeals. Reversed, and verdict reinstated, and judgment directed for plaintiff.

Argued December term, 1913, before Seabury, Guy, and Bijur, JJ.

Davis & Mayer, of New York City, for Appellant.
Isidor Cohn, of New York City, for Respondent.

GUY, J.

The plaintiff herein appeals from an order setting aside the verdict of a jury in an action brought to recover a death benefit of \$500, payable to the designated beneficiary upon the death of a member in good standing; the beneficiary in this instance being the widow of a member alleged to be dead.

* Decision rendered, Jan. 3, 1914. 145 N. Y. Supp. 74.

The evidence shows that the plaintiff's husband, the assured, had been living on good terms with plaintiff and their child for several years; that he was steadily employed; that the day before his alleged disappearance he brought his wages home and gave them to his wife; that he had money in bank, which was not withdrawn by him; that he left all of his personal effects in his home; that on the morning of the alleged disappearance, November 15, 1903, he left his home at the usual hour, kissing his wife goodbye, and from that time has not been seen or heard from, notwithstanding most exhaustive and persistent efforts to discover him, made by various of his relatives. The evidence further shows that, about two weeks after his disappearance, plaintiff notified the secretary of Daniel Lodge, the subordinate lodge of the defendant order to which the alleged decedent belonged, of the fact of his disappearance, and that said secretary, designated by the by-laws as the officer to whom notice of death should be given, then stated to her, "All right, there could be nothing done until after seven years, until they found out he was really missing"; that thereafter, in order to preserve the good standing of her husband, so that her rights to said benefit might not be forfeited, plaintiff continued paying benefit assessments to said order until the said term of seven years had elapsed.

It is conceded that there is no record of the death of the assured in the board of health in this city. About December 15, 1912, plaintiff filed with the secretary of the defendant order proof of death of her husband, in the form of affidavits setting forth the facts as to his disappearance and the efforts that had been made to discover his whereabouts, as above stated.

A copy of the constitution of the defendant order was offered in evidence by plaintiff. Defendant moved to dismiss the complaint on the ground of failure to comply with the provisions of the constitution as to proof of death. This motion was denied. Defendant introduced no evidence. The case was submitted to the jury, which rendered a verdict in favor of plaintiff. Defendant then moved to set aside the verdict on the ground that there was no proof of death in accordance with the constitution of the defendant order, which, at page 27 thereof, provides:—

"It shall be the duty of any person who claims a death benefit to immediately, upon the decease of a member in good standing, notify the secretary of the lodge of which the deceased was a member of the death of such member, and file with the secretary of such subordinate lodge a copy of the record of death issued by the board of health or other proper officer keeping the records of death of the city where said member died. The secretary of such subordinate lodge shall forthwith transmit said record of death to the grand secretary, who, after the report of the endowment committee to the executive committee, and the approval of the executive committee of the claim, shall notify all lodges of the

order of such death and request the payment by the lodges of the prescribed assessments.

"After approval by the endowment committee of a claim for death benefit, there shall be paid to the person or persons legally entitled thereto, within the time and in the manner hereinafter described, the amount of endowment provided for by this constitution."

Briefs were submitted, and subsequently the court granted the motion setting aside the verdict "under the authority of Kelly vs. Supreme Council, 46 App. Div. 79 [61 N. Y. Supp. 394]."

An examination of the case cited by the learned trial justice discloses a radical difference between that case and the case at bar, in that in the case cited it was provided by a by-law of defendant Supreme Council that:—

"No time of absence or disappearance on the part of a member, without proof of actual death, shall entitle his beneficiary to recover upon his membership certificate."

In that case the parties entered into the contract of membership and insurance having in contemplation the possibility of disappearance without actual proof of death, and providing specifically that no benefit rights should accrue in that event. In the case at bar there is no such provision barring any claim based upon disappearance or that actual proof of death shall be a condition precedent to recovery. The provisions as to method of proof are merely directory, both as to the beneficiary and the members of the subordinate and grand lodges. They establish a method of procedure which shall be followed upon the death of a member in good standing. The constitution provides that, upon the death of a member in good standing, the beneficiary shall be entitled to a benefit of \$500. The method of proof of death and the procedure which shall follow upon the filing of such proof is but a declaration as to what course shall be followed under ordinary circumstances. The record proof is, where obtainable, to be regarded as the best evidence of death, which must be filed if such proof exists; but where in the nature of things, such evidence cannot be obtained, then the power rests in a court of justice to accept such secondary proof as will establish the fact of death under rules of law recognized by judicial tribunals. The method of procedure prescribed by the constitution of the defendant order directs that several steps shall be taken in connection with the presentation, examination, approval, and payment of a claim: First, immediate notification to the secretary of the subordinate lodge and filing with said secretary a copy of the record of death of the member kept by the board of health, or similar body, of the city in which the death occurs. Second, the forwarding of said record and notice by the secretary of the subordinate lodge to the grand secretary of the grand lodge. Third, the report of the endowment committee to the executive committee of the

grand lodge. Fourth, the approval of the claim by the executive committee of the grand lodge.

It could not be seriously contended that the failure by officers of the subordinate lodge or grand lodge to comply with any or all of these separate details of procedure could defeat the rights of the beneficiary which accrued upon the death of a member in good standing, though they are all essential parts of the method of procedure prescribed by the constitution, to be followed upon the death of a member. Nor could it be maintained that if there were actual proof of death occurring in a place where no public record of deaths were kept, or where such records were kept, but had subsequently been destroyed by fire or otherwise, that the failure to produce a copy of the record would defeat the beneficiary's claim. In such event the law would not require the doing of a thing which is in its very nature impossible, unless the doing of such thing was of the essence of the contract and a condition precedent to the accruing of any rights thereunder.

"Such condition in a policy of insurance must be considered as inserted for some reasonable and practical purpose and not with a view of defeating a recovery in case of loss by requiring the parties to do something manifestly impossible." *Trippe vs. Phoenix Fr. Soc.*, 140 N. Y. 23-26, 35 N. E. 316 (22 L. R. A. 432, 37 Am. St. Rep. 529.)

See, also, *Sargent vs. London, L. & G. Ins. Co.*, 155 N. Y. 349, 49 N. E. 935.

There are two things that are of the essence of this contract of membership and insurance: First, good standing of the member at the time of his death; second, competent proof of death.

The main question presented upon this appeal is whether plaintiff filed with the defendant order competent proof of death. Where actual, direct proof of death cannot be obtained, the fact of death may be proved presumptively as well as by direct evidence. See *Greenleaf on Evidence*, § 41. Continued absence from one's last and usual residence may, under certain conditions, raise a presumption of death. *Sheldon vs. Ferris*, 45 Barb. 124; *Ferry et al. vs. Sampson*, 112 N. Y. 415, 20 N. E. 387; *Cambreling vs. Purton et al.*, 125 N. Y. 611, 26 N. E. 907.

"He may leave under circumstances which will satisfy the court that he must be dead or he would have returned or reported." *Matter of Smith*, 77 Misc. Rep. 76, 136 N. Y. Supp. 825.

The refusal by the defendant to pay the benefit to the beneficiary under such circumstances as are presented in this case furnishes a sad commentary on the supposed benevolence of some orders of this character. Morally, equitably, legally, plaintiff is entitled to recover.

It might also be urged with some force that, even were actual proof of death to be deemed a condition precedent to payment of death benefit under the by-laws of the order, the defendant, after

notice to its designated agent of the member's disappearance, by receiving premiums from plaintiff for the full period of seven years, after statement by its agent that it would be necessary to wait seven years to establish the fact that the member was missing, must be deemed, under all the circumstances of the case, to have waived actual proof of death.

The order setting aside the verdict of the jury herein must therefore be reversed, with costs, the verdict reinstated, and judgment directed in favor of plaintiff in accordance therewith.

SEABURY, J.

I concur in the view that the order setting aside the verdict of the jury rendered in favor of the plaintiff should be reversed and the verdict reinstated.

The methods prescribed in the constitution of the defendant, by which the fact of death was required to be proved, are applicable only where that is susceptible of that manner of proof. In this case it is impossible to present such proof, and the records which the constitution of the defendant require to be produced, and which would ordinarily be available, are not in existence. Under these circumstances, it is obvious that the plaintiff could not produce them, and it would be unreasonable to so construe the provisions of the defendant's constitution as to require their production. If the contract of insurance contemplated, as I think it did, that loss should accrue upon the death of the insured and did not in terms exclude liability where the death occurred under such circumstances as to make the presentation of the proof specified in the constitution of the defendant impossible, then the parties to the contract could not have contemplated that the proofs of death ordinarily available and required should be presented in such a case.

A different question would be presented if the contract of insurance provided that death should not be presumed from absence or disappearance (*Kelly vs. Supreme Council*, 46 App. Div. 79, 61 N. Y. Supp. 394); or that disappearance should not be evidence of death until a time specified had expired (*Porter vs. Home Friendly Society*, 114 Ga. 937, 41 S. E. 45), or contained any other substantially similar provision.

There being no such provision in the contract, loss accrued upon the death of the insured. 25 Cyc. 874.

The plaintiff proved not only the absence of the insured for a period longer than seven years, but also that diligent efforts had been made to find him, and that these efforts had been unsuccessful, and that no tidings of the insured have been received by his relatives and friends during that time. These circumstances, in the absence of any evidence to the contrary, gave rise to the presumption that the insured was dead. This presumption was one

of fact, and the finding of the jury that the insured was dead was warranted under the circumstances disclosed.

There is no arbitrary rule as to the duration of the absence which gives rise to the presumption of death, although by analogy to the time fixed in certain English statutes (1 Jac. 1 c. 2, § 2 and 19 Car. 11, c. 6, § 2) the courts have generally considered that an absence of seven years, there being no circumstances which tended to negative the inference, gave rise to the presumption of death. *Merritt vs. Thompson*, 1 Hilt, 550; 18 Cyc. 298.

It is urged by the defendant that the insured may be alive, and that while this policy exists it should not be required to pay the amount of the policy. The evidence does not negative the possibility that the insured is still alive, but it furnishes strong reasons to believe that he is dead. As was well stated by Judge Daly in *Merritt vs. Thompson*, *supra*:-

"The question is not whether it is possible that he may be alive, but whether the circumstances of this case do not warrant that strong probability of his death upon which a court of justice should act. * * * Courts of justice do not allow the consideration of possibilities to outweigh a case of strong probability, but adopt and act upon those presumptions which seem most in accordance with the ordinary and usual course of events. Presumption, founded on a reasonable probability, must prevail against mere possibilities, for, were it otherwise, the conclusion could never be arrived at that a man was dead, until the natural limit of human life had been reached."

Bijur, J., concurs.



**SUPREME COURT OF NEW YORK.
APPELLATE DIVISION. FIRST DEPARTMENT.**

MURPHY

vs.

COLONIAL LIFE INS. CO. OF AMERICA.*

**INSURANCE—LIFE INSURANCE—BREACH OF CONDITIONS—
STATUTE.**

Under Insurance Law (Consol. Laws 1909, c. 28) § 58, providing that every life policy shall contain the entire contract, statements made by the insured in the application cannot be considered where they were not made a part of the policy; the provision that all statements made by the insured should be deemed representations and not warranties relating only to those which were so incorporated.

* Decision rendered, Jan. 3, 1914. 145 N. Y. Supp. 196.

(For other cases, see Insurance, Cent. Dig. §§ 214-217; Dec. Dig. § 134.)
Bijur, J., dissenting.

Appeal from Municipal Court, Borough of Manhattan, Third District.
Action by Mary Murphy against the Colonial Life Insurance Company of America. From a judgment for plaintiff, defendant appeals.
Affirmed.

Argued October term, 1913, before Seabury, Guy, and Bijur, JJ.

Magner & Carew, of Brooklyn (John F. Carew, of Brooklyn, of counsel), for Appellant.

Charles Moise, of New York City (Thomas A. McCole and Edward Potter, both of New York City, of counsel), for Respondent.

SEABURY, J.

This action is brought upon an industrial life insurance policy for \$360, the premium upon which was payable weekly. As a defense, the defendant claims that the policy was procured by false and fraudulent representations contained in the application for the policy. The alleged fraud consists in the answer, "No," to the question in the application blank, "Is the proposed now insured in any other company, association or society, and if so for what amount?" The application was not indorsed on the policy or attached thereto, and for that reason the learned court below excluded evidence as to the application and as to the alleged falsity of the answer said to be contained therein. This ruling was made in deference to section 58 of the Insurance Law (Consol. Laws 1909, c. 28). The section provides as follows:—

"Every policy of life insurance issued after January 1, 1907, shall contain the entire contract between the parties, and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application or other writings unless the same are indorsed upon or attached to the policy when issued, and all statements purporting to be made by the insured shall, in the absence of fraud, be deemed representations and not warranties. Any waiver of the provisions of this section shall be void."

I think that the ruling of the court below is sustained by the case of Becker vs. Colonial Life Ins. Co., 153 App. Div. 382, 138 N. Y. Supp. 491. I had occasion to express the same view in Aaronson vs. New York Life Ins. Co., 81 Misc. Rep. 228, 142 N. Y. Supp. 568, although my learned colleagues held that the representations made to induce the issuance of the policy, whether oral or in a paper not attached to the policy, may, if material, be relied upon by the insurer to defeat a recovery.

This interpretation seems to me to nullify the statute and prevent the accomplishment of its remedial purposes. The clause of section 58 of the Insurance Law, upon which the argument of the appellant is based, provides as follows:—

"And all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties."

This clause is not an exception to the general rule declared in the body of section 58. The clause, as I understand it, means that, if the insurer intends to claim that it was induced to enter into a policy by virtue of any statement of the insured, it must express that statement in the policy or attach it thereto, and such statement so attached shall be deemed a representation and not a warranty, but any statement so attached, whether a representation or not, shall upon proof of fraud avoid the policy. Thus interpreted, the clause is given a meaning which does not defeat the purpose of the statute. I regard this interpretation as in accord with that given to the statute in *Becker vs. Colonial Life Insurance Co.*, *supra*, where Mr. Justice Burr said:—

"Fraud vitiates any contract, and, if proved, constitutes a good defense to an action based thereon. But to constitute fraud growing out of representations, such representations must not only have been knowingly false, but in addition they must have been material, and relied upon as an inducement to the making of the contract." 20 Cyc. 39; *Brackett vs. Griswold*, 112 N. Y. 454, 20 N. E. 376; *Powell vs. Linde Co.*, 58 App. Div. 261, 68 N. Y. Supp. 1070, affirmed 171 N. Y. 675, 64 N. E. 1125.

I advise that the judgment be affirmed, with costs.

Judgment affirmed, with costs.

Guy, J., concurs.

BIJUR, J. (dissenting).

This action was brought to recover on what is known as an industrial life insurance policy.

The serious question presented on this appeal arises out of the exclusion by the learned court below of all evidence of the falsity of a statement made by the insured in her application, which was not attached to the policy in suit, in answering question No. 12, "Is life proposed, now insured in any other company?" to which the answer was, "No." This testimony was excluded on the theory that section 58 of the Insurance Law forbids its consideration in aid of a defense of fraud in the procurement of the policy. Section 58 reads as follows:—

"Every policy of life insurance issued after January 1st. 1907, shall contain the entire contract between the parties, and nothing shall be incorporated therein by reference to any other writings unless the same are indorsed upon or attached to the policy when issued and the statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties. Any waiver of the provisions of this section shall be void."

From the record, it appears evident that the learned court below was urged by defendant-appellant to disregard section 58 because of section 101 of the Insurance Law, and correctly held that the general language of section 58 was not affected by the latter section. It appears also that the case of *Becker vs. Colonial Life*

Ins. Co., 153 App. Div. 382, 138 N. Y. Supp. 491, decided in November, 1912, was relied upon. The Becker Case, however, approved the exclusion of a representation made in a statement not indorsed upon a policy only because the policy there in suit provided that "the consideration for the issuing thereof is 'the application therefor, which is hereby made a part of this contract.'" The application was actually annexed to the policy and called "a copy of the application upon which this policy is issued." The court there said:—

"The parties had a right to stipulate * * * that the inducing cause of the contract * * * was certain specified statements and representations, and none others. * * * Having so stipulated, and having attached one application to the policy, if any others were made, the defendant in effect said, these are not material and are not relied upon by me."

In other words, the exclusion of evidence of representations contained in an application not annexed to the policy was sustained because, by the language of the policy itself, the representations were rendered immaterial. There is no such condition presented in the case at bar, and indeed, in the Becker Case, the court said, at page 386 of 153 App. Div., page 494 of 138 N. Y. Supp.: .

"We are not called upon to decide at this time what the effect would have been under the New York statute if neither decedent's personal application nor any other paper in the nature of an application had been attached to the policy."

Section 58 of the Insurance Law provides only that the entire contract, as executed, must be contained in the policy, and that nothing shall be incorporated therein by mere reference to other documents unless they are attached to the policy. It was perhaps quite competent for the Legislature to have enacted that no statement made by the assured unless the statement or a copy thereof be attached to the policy, shall be available to avoid the same; but I cannot find either by expression or implication, any intimation to that effect in section 58.

Wheclock vs. Home Life Ins. Co., 115 Minn. 177, 131 N. W. 1081 (Minnesota, 1911) turned upon the language of a Minnesota statute which is altogether different from ours in this respect. Minnesota Laws 1907, c. 220 (Gen. St. 1913, §§ 3470-3483), provides that every insurance policy must contain the following clause:—

"All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statements shall avoid such policy unless it (sic) is contained in a written application, and a copy of such application shall be indorsed upon or attached to the policy when issued."

The Supreme Court of Minnesota held that, under a provision so broad, a false statement in an application not attached to the policy could not be availed of to defeat it. And in the Becker

Case it is pointed out that the same distinction, i. e., between statements forming a part of a contract, and statements made anterior to its execution for the purpose of inducing the same, is noted in *Mutual Life Ins. Co. vs. Allen*, 166 Ala. 159, 51 South. 877. See, also, *Empire Life Ins. Co. vs. Gee*, 171 Ala. 435, 55 South. 166.

In *Aaronson vs. N. Y. Life Ins. Co.*, 81 Misc. Rep. 228, 142 N. Y. Supp. 568, I had occasion to discuss the question here presented because it was covered by the opinion of the learned court below as one of the grounds for setting aside a verdict; but the decision of this point was not directly involved in that case. Mr. Justice Seabury, who dissented from the views of the majority on this particular question in the Aaronson Case, nevertheless, concurred in the result because of the other reasons stated in the opinion there. Under the circumstances, it seems to be proper to decide this point in the case at bar on the assumption that there has been no adjudication thereon.

It is to be noted in passing that, through some inadvertence either in transcription or printing, two paragraphs in our opinion in the Aaronson Case have been distorted. In the last paragraph of the prevailing opinion, the word "defendant" should read "plaintiff." The sentence at the beginning of the third paragraph on page 229 of 81 Misc. Rep., page 569 of 142 N. Y. Supp., should read as follows:—

"As the defense was, in substance, fraud or false representations inducing the making of the policy, it is evident that, if the jury answered both of the above questions in the affirmative, the verdict must have been for defendant; and, as it was for the plaintiff, it is clear that the jury must have answered one or both of these questions in the negative."

The judgment should be reversed, and a new trial granted, with cost to appellant to abide the event.

SUPREME COURT OF WISCONSIN.

TOURTELLOTTE ET AL.

vs.

NEW YORK LIFE INS. CO.*

INSURANCE—LIFE INSURANCE — CONTRACTS — CONSTRUCTION.

A distribution policy of \$10,000 provided for the participation in profits and surplus, and that, at the completion of the distribution period,

* Decision rendered, Jan. 13, 1914. 144 N. W. Rep. 1117.

insured should be allowed to apply the accumulated surplus to the purchase of an annuity to continue the policy for the original amount, and withdraw in cash the accumulated surplus, to withdraw in cash the entire equity that is the net reserve of \$3,607.20 and accumulated surplus, to convert the equity into a paid-up policy, to convert the equity into a life annuity, or to continue the policy for the original amount, and convert the apportioned surplus into a reversionary addition. With the policy, the insurer sent a statement reciting that at the end of twenty years the contract guaranteed an option to the holder between six different methods of settlement, and that the principal option as based on the results realized on tontine policies maturing during the current year were the right to cash the policy at a value of \$8,160, to take a paid-up policy for \$13,400, or to continue the policy at the annual rate, less \$4,553 dividends in cash. *Held*, that the statement sent with the policy, although considered part of the contract, did not guarantee or promise a cash value of \$8,160 at maturity, it being expressly stated that it was illustrative of the options given the holder, and that the figures were based on the results of other tontine policies, and hence the holder was only entitled to the earnings which were rightly apportioned to his policy.

(For other cases, see Insurance, Cent. Dig. § 358; Dec. Dig. § 173.)

Appeal from Circuit Court, La Crosse County; E. C. Higbee, Judge.

Action by Mills Tourtellotte and another against the New York Life Insurance Company. From a judgment for defendant notwithstanding the verdict, plaintiffs appeal. Affirmed.

Action to recover the amount of \$8,160 claimed to be due on an insurance policy, less the sum of \$3,420 admitted to be owing from plaintiff Tourtellotte to defendant upon a loan evidenced by his note. In 1892 the plaintiff Tourtellotte made application to the defendant for a distribution policy of \$10,000, with a special guaranty and mortuary dividend. The policy of insurance, in the usual form, numbered 454346, was delivered to him pursuant to the application. The policy contained, among other provisions, the following:—

"This policy is issued on the distribution policy plan, the particulars of which are as follows: That the distribution period for this policy be completed on the 28th day of February in the year nineteen hundred and twelve. That no dividend of surplus shall be allowed or paid upon this policy, unless the insured shall survive until completion of its distribution period, and unless this policy shall then be in force. That surplus or profits derived from such policies on the distribution policy plan as shall not be in force at the date of the completion of the respective distribution periods, shall be apportioned among such policies as shall complete their distribution periods. That after the completion of the distribution period, provided this policy shall not have been previously terminated, this policy shall secure to the insured one of the following benefits:

"First. To apply the accumulated surplus apportioned by the company to this policy to the purchase of an annuity on the life of

the insured to be used in reduction of subsequent premiums on this policy, and in case the amount accruing in any year from the annuity shall exceed the amount of premium due thereon, the excess to be paid in cash.

"Second. To continue the policy for the original amount and withdraw in cash the accumulated surplus apportioned by the company to this policy.

"Third. To withdraw in cash the entire equity (that is, the net reserve, being thirty-six hundred and seven dollars and twenty cents [\$3,607.20] and in addition thereto the accumulated surplus aforesaid).

"Fourth. To convert the entire equity into paid-up policy without participation in profits, for an amount to be determined by the method then in use by the company in determining paid-up policies of this class; provided that this policy is legally surrendered during the lifetime of the insured, and within ninety days from the completion of the distribution period.

"Fifth. The conversion of the entire equity into a life annuity upon the life of and payable to the insured.

"Sixth. To continue the policy for the original amount, and to convert the apportioned surplus into a reversionary addition conditioned upon satisfactory re-examination.

"These benefits are at the option of the insured."

The policy was delivered by mail, and the jury found by special verdict that inclosed with the policy, but not attached thereto, was the following statement, marked "Exhibit 2," and that it was the intention of the parties that such statement should be a part of the contract of insurance:—

Statement	Assets	\$115,000,000.00
	Surplus	15,000,000.00
	Annual Income	32,000,000.00
Illustrating Contract No. 454,346		
of the		
New York Life Insurance Company		
for		
Mr. Mills Tourtellotte.		
Age 38. \$10,000.		

(Here follows a tabular statement, the first column of which enumerates the policy years from 1 to 20; the second and third columns show the total amount deposited, and contain the company's guaranty to loan any or all of the premiums after the tenth year at the rate of 6 per cent per annum. The fourth column shows the total amount of protection guaranteed in case of death, being \$10,000 for each of the years from 1 to 10, inclusive, and from the eleventh to twentieth, inclusive, increasing from \$10,342 in the eleventh year to \$13,420 in the twentieth year, or \$342 each year. The fifth column shows the net profits for each year, assuming death occurred in that year, over amount invested. The

sixth column guarantees a proportionate protection in case of discontinuance after three full annual deposits have been made.) The statement then continues:—

"At the end of twenty years the contract guarantees (as expressed therein) an option to the holder between six different methods of settlement. The three principal of these methods are illustrated below; the figures there given are based on the results realized on tontine policies which have matured during the current year in this company.

"First option, cash value, \$8,160.00.

"Second option, paid-up policy for \$13,400.

"Third option, continue policy at original rate less annual dividends, \$10,000 and \$4,553 in cash.

"Nonforfeitable, as per terms of contract after three full annual deposits have been made."

At the end of the distribution period plaintiff Tourtellotte exercised the third option mentioned in the policy, or the first in the statement accompanying the same, namely: To withdraw in cash the entire reserve and surplus value of the policy. Upon being informed by the company that the total cash value of his policy amounted to \$5,889.60, the plaintiff Tourtellotte, under date of January 26, 1912, sent a letter to the defendant, which contained, among other things, the following statements: "I have, from your branch office Milwaukee, letter of the 22nd inst., advising me that the total cash value of said policy at maturity will be \$5,889.60, which covers a dividend of \$2,282.40 and the reserve of \$3,607.20, and after deducting the amount of the note of \$3,420, will have a net of \$2,469.60. This result is not in the least satisfactory, and I protest against any such discharge of the obligation, and I refuse to accept it. Accompanying the policy, and in illustration of said contract No. 454346 (given out and issued by authority of your company), is a written and printed guaranty which gives the cash surrender value thereof at maturity of \$8,160, and after deducting the outstanding note of \$3,420, leaves a net value of \$4,740, which your representation showed, and that I had a right to expect in cash at this time." Then follows a statement showing what he paid to the company, and the letter continues: "This is too far short of what the results should be, and what were represented they would be. The only logical conclusion is that a mistake has been made, in that I have not been credited with the earnings of the note feature of the contract; that the notes have been charged off against the cash earnings. Certainly, if I am to be charged with the notes, I should have credit for the earnings due to the loan feature thereof. The payment of the notes makes the whole transaction on a cash basis, and the earnings must be figured as such. * * * So I say again that the net return of \$2,469.60 is a mistake or I have been robbed of my just application of profits honestly applicable to my contract.

There has been too little applied to the policy and too much gone to make up that many millions surplus we hear so much about. I am entitled to profits from lapses, guaranteed surplus, and an honest division of earnings derived from the premiums both from the cash and note payments. Can you have those figures verified, and see if there is not some mistake somewhere that justifies me in making this complaint? What I demand in the option available is the full cash surrender value; but I decline to settle for the sum named. It is not right, fair, or just."

In reply the company informed plaintiff Tourtellotte that the amount stated was correct, whereupon he brought this action against it, claiming that the contract guaranteed the payment of the sum of \$8,160. The defendant denied that the policy guaranteed the payment of \$8,160 in any event, and alleged that the plaintiff Tourtellotte was entitled to receive as the cash value of said policy the entire equity (that is, the net reserve) expressly stipulated in the contract to be the sum of \$3,607.20, and, in addition thereto, the accumulated reserve apportioned and distributed in accordance with the principles and method adopted by it to determine the amount equitable belonging to said policy, which amount was apportioned on the 28th day of February, 1912, and was the sum of \$2,282.40, making in the aggregate the sum of \$5,889.60.

The action was tried by a court and jury. A special verdict of two questions was submitted, as follows:—

"(1) Was Exhibit 2 inclosed and delivered by the defendant to the plaintiff Mills Tourtellotte with Exhibit 1? Answered by the court: Yes.

"(2) Was it the intention of the parties at the time of the delivery of the policy that Exhibit 2 should constitute and be a part of the contract of insurance? Answer: Yes."

Exhibit 1 referred to above was the policy sued upon. The plaintiff the National Bank of La Crosse held the policy when it matured as collateral security to a loan made by it to the plaintiff Tourtellotte. The court entered judgment for the defendant notwithstanding the verdict, and the plaintiffs appealed.

George H. Gordon, of La Crosse, for Appellant.

McConnell & Schweizer, of La Crosse (James H. McIntosh, of New York City, of counsel), for Respondent.

VINJE, J. (after stating the facts as above).

The question raised by the appeal is, Does the statement, Exhibit 2, treating it as a part of the contract of insurance, change the policy so as to make it guarantee or promise a cash value of \$8,160 at maturity? The trial court held that it did not. Was such ruling correct? The statement purports to do nothing but illustrate or explain the contract. It contains no words of promise or guaranty. It does not even guarantee an option between the six

different methods of settlement, for it says the contract (as expressed therein) does that. Then it proceeds to *illustrate* the three principals of these methods, and says expressly that the figures there given are based on the results realized on tontine policies of the company maturing the current year. There is not even an intimation or suggestion that the same results may be expected in the future. The only rational construction that can be given the statement, taken in connection with the policy, so far as the question at issue is concerned, is that it shows what the first option will be worth, if the earnings of this policy equal that of tontine policies of the company maturing the current year. There is no claim that, based upon the results stated, such was not the value of the option. The language of the statement attached to the policy in the case of Timlin vs. Equitable Life Assurance Society, 141 Wis. 276, 124 N. W. 253, was quite different. It was held to contain words of promise as to the amount to be paid; while here we have language which purports only to illustrate the policy, and which states the source of the figures upon which the illustration is based. For cases in which it has been held, under somewhat similar statements in connection with the policy, that there was no guaranty as to amount, see Untermeyer vs. Mut. L. Ins. Co., 128 App. Div. 615, 113 N. Y. Supp. 221; Langdon vs. N. W. Mut. L. Ins. Co., 199 N. Y. 188, 92 N. E. 440; Grange vs. Penn Mut. L. Ins. Co., 235 Pa. 320, 84 Atl. 392.

That the plaintiff Tourtellotte understood his contract of insurance was one that, upon completion, entitled him to guaranteed reserve of \$3,607.20, and, in addition thereto, its equitable share in the surplus or profits, is quite evident from his letter to the company set out in the statement of facts. It is true he there refers to the statement in illustration of the contract; but that such reference was made for the purpose of emphasizing the inadequate result rather than as a claim for the specific amount of \$8,160 is quite apparent from the concluding part of the letter, where he says: "I am entitled to profits from lapses, guaranteed surplus, and an honest division of earning derived from the premiums both from the cash and note payments. Can you have those figures verified, and see if there is not some mistake somewhere that justifies me in making this complaint?" If he had thought he was entitled to an absolute amount of \$8,160, he would not have written thus. The claim that he was entitled to such sum, and, in addition thereto, in a share of the earnings, is wholly untenable. The trial court correctly construed the contract of insurance.

Judgment affirmed.

Siebecker, J., took no part.

COURT OF APPEALS OF GEORGIA.**ARMSTRONG ET AL.***vs.***EQUITABLE LIFE ASSUR. SOCIETY OF THE U. S. (No. 5,343.)*****1. INSURANCE—POLICY—CASH SURRENDER VALUE—PETITION.**

A policy of insurance provided that in case of nonpayment of premiums the policy might be surrendered, and in lieu thereof a paid-up policy of a certain character would be issued. There was no provision that after nonpayment of any premium the policy would have a cash surrender value. After nonpayment of a premium, and after complying with the conditions of the policy necessary to entitle the insured to the issuance of a paid-up policy, suit was brought to recover a specified sum as the cash surrender value of the policy, which the plaintiffs alleged the defendant had agreed to pay upon the surrender of the policy. The plaintiffs set out in the petition a letter from an agent of the defendant, which is relied upon as a contract upon the part of the defendant to pay the sum sued for. This letter was as follows: "I am in receipt of your letter of the 6th inst., in further reference to policy No. 943453—Daly. Upon referring to the policy you will find that the present cash value of same is \$612. I inclose herewith the necessary voucher to be signed by all parties interested, and which is to be sent to me, together with the policy, and all assignments and reassignments, and the matter will be given attention." The petition alleged that the writer of this letter was duly authorized by the defendant company to write the letter. The policy provided that the contract could not be varied except in writing and by one of certain named officers of the company. It was not alleged that the writer of the letter was one of these officers. *Held*, the petition set forth no cause of action, there being no provision in the policy for the payment of any sum of money after the policy had become lapsed by nonpayment of premiums. For this reason no cause of action upon the policy was set forth in the petition.

(For other cases, see Insurance, Cent. Dig. §§ 194, 940; Dec. Dig. § 370.)

2. INSURANCE—CASH SURRENDER VALUE—INDEPENDENT CONTRACT—ESSENTIALS.

The alleged contract to pay cash, being a separate and independent undertaking, not provided for by the policy, cannot be the basis of a cause of action, unless it contains the essential elements of a contract. The letter relied upon is not a contract, and does not contain any promise to pay any sum of money, but amounts merely to a statement that if certain conditions will be complied with, the company will give the request for the payment of a sum of money due attention. Even if the letter had contained a distinct promise to pay, there was no consideration for the promise, and for this reason it cannot be enforced. At the time the letter was written the right to have a paid-up policy issued had expired, the policy had absolutely lapsed, and the promise of the defendant's agent to pay the plaintiffs a sum of money was a mere *nudum pactum*.

* Decision rendered, Jan. 27, 1914. 80 S. E. Rep. Syllabus by the Court.

(For other cases, see Insurance, Cent. Dig. §§ 937, 938; Dec. Dig. § 369.)

3. POLICY—CASH SURRENDER VALUE— PETITION.

Under the rulings above made, the petition set forth no cause of action, even though the allegations in reference to the authority of the agent to write the letter sufficiently shows that the company itself had directed that the letter be written.

Error from City Court of Richmond County; Wm. F. Eve, Judge.
Action by J. P. Armstrong and others against the Equitable Life Assurance Society of the United States. Judgment for defendant, and plaintiffs bring error. Affirmed.

Isaac S. Peebles, Jr., of Augusta, for Plaintiffs in Error.
Bryan Cumming and Jos. B. Cumming, both of Augusta, for Defendant in Error.

ROAN, J.

Judgment affirmed.

AMERICAN TEMPERANCE LIFE INS. ASS'N OF CITY OF NEW YORK vs. SOLOMON ET AL.*

(United States Circuit Court of Appeals, Third Circuit.)

1 TRIAL—DOCUMENTS—PROOF BY SUBSCRIBING WITNESSES—WAIVER—ADMISSION WITHOUT OBJECTION.

Where an application for life insurance, alleged to have been executed by decedent before subscribing witnesses, was admitted in evidence without objection, it was in the case for all purposes as though it had been proved by the subscribing witnesses, and it could not thereafter be objected that the party introducing the same did not call such witnesses.

(For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. § 105.)

2 TRIAL—FALSE REPRESENTATIONS—PROOF—PRIOR APPLICATION—INSTRUCTIONS.

Where a prior application for life insurance, alleged to have been executed by insured by a mark before witnesses, and rejected by the insurer, was admitted in evidence without objection, and without proof of its execution by the subscribing witnesses, to show the falsity of an answer in a subsequent application by insured, in which he stated that he had never been rejected, an instruction, submitting to the jury the question whether defendant had proved that such alleged prior application was in fact executed by insured because the subscribing witnesses had not been called to testify, and further instructing that, if the jury should find that insured did not sign such application, then it was not his application, was erroneous.

(For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. § 105.)

In Error to the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

* Decision rendered, Nov. 25, 1913. 209 Fed. Rep. 345.

Action by Louis Solomon and others, as administrators of Max Solomon, deceased, for use, etc., against the American Temperance Life Insurance Association of the City of New York. Judgment for plaintiffs, and defendant brings error. Reversed, and new trial ordered.

George R. Wallace, of Pittsburgh, Pa., for Plaintiff in Error.

George H. Quail, of Lima, Ohio, and Weil & Thorp, of Pittsburgh, Pa., for Defendants in Error.

Before Gray, Buffington, and McPherson, Circuit Judges.



OCCIDENTAL LIFE INS. CO. vs. JACOBSON.*

(Supreme Court of Arizona.)

1. INSURANCE—PAYMENT OF PREMIUMS—PREMIUM NOTES.

If the policy or notes provide for forfeiture for nonpayment of premium notes, and such provision is not waived, the giving of a note does not operate as a payment of the premium, but merely postpones the time for payment.

(For other cases, see Insurance, Cent. Dig. §§ 913, 916-922, 924; Dec. Dig. § 360.)

2. INSURANCE—FORFEITURE FOR NONPAYMENT—WAIVER OF FORFEITURE.

Where a policy provided that upon failure to pay a premium note when due, the policy should become void without action by the company, the company, by accepting a payment of interest after a premium note was due, and also a payment of one-half of the principal of the note, waived the provision for forfeiture.

(For other cases, see Insurance, Cent. Dig. §§ 1041-1056, 1058-1070; Dec. Dig. § 392.)

3. WORDS AND PHRASES—“WAIVER.”

“Waiver” occurs when one having a right conferred by law or contract, with full knowledge of the material facts, does, or forbears to do, something inconsistent with the existence of the right, or of his intention to rely on it.

(For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381, 7831, 7832.)

4. INSURANCE—FORFEITURE FOR NONPAYMENT—WAIVER.

A forfeiture clause in an insurance policy for nonpayment of premiums may be waived by the insurer.

(For other cases, see Insurance, Cent. Dig. § 941; Dec. Dig. § 372.)

5. INSURANCE—FORFEITURES—POLICY OF LAW.

The law does not favor forfeitures, and courts readily seize upon the opportunity to bring about a waiver of a forfeiture provision in an insurance policy by placing a liberal construction upon the acts of the insurer, if such construction is demanded by justice, and not repugnant to law.

* Decision rendered, Jan. 14, 1914. 137 Pac. Rep. 869.

(For other cases, see Insurance, Cent. Dig. §§ 1026, 1027, 1030, 1035, 1040, 1057; Dec. Dig. § 388.)

Appeal from Superior Court, Maricopa County; J. C. Phillips, Judge. Action by Alberta Jacobson against the Occidental Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Alonzo B. McMillan and Chalmers & Kent, all of Phoenix, for Appellant.

Chas. Woolf, of Tempe, for Appellee.



**GERMANIA LIFE INS. CO. OF NEW YORK CITY vs.
KLEIN.***

(Court of Appeals of Colorado.)

1. INSURANCE—LIFE INSURANCE—CONTRACTS.

A life policy which stipulates that insurer issues the policy in consideration of the representations made in the application which is made the basis of and a part of the contract makes the application a part of the contract.

(For other cases, see Insurance, Cent. Dig. §§ 308-311; Dec. Dig. § 151.)

2. INSURANCE — LIFE INSURANCE — MISREPRESENTATIONS IN APPLICATION.

Where statements in an application for life insurance are false and material to the risk on which the policy is based, the false statements avoid the policy whether the representations were the result of intention or of mistake or whether made in good faith or not.

(For other cases, see Insurance, Cent. Dig. §§ 540, 549; Dec. Dig. § 256.)

3. INSURANCE — LIFE INSURANCE — MISREPRESENTATIONS IN APPLICATION.

A statement made in an application for a life policy that the applicant had not had any of diseases inquired of and had never consulted a physician, while as a fact she had consulted a physician who had treated her for carcinoma of the liver without advising her of the gravity of her disease, is a false statement invalidating the policy issued in consideration of the statements in the application, whether deemed a representation or a warranty.

(For other cases, see Insurance, Cent. Dig. §§ 691, 692; Dec. Dig. § 292.)

4. TRIAL—INSTRUCTIONS—INCONSISTENT INSTRUCTIONS.

Where two instructions are irreconcilable and one of them is wrong, the instructions are bad as a whole.

(For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.)

5. INSURANCE—LIFE INSURANCE—REPRESENTATIONS AS TO AGE.

A misrepresentation by an applicant for life insurance of her age by representing that she was fifty years old at her nearest birthday, while in

* Decision rendered, Dec. 8, 1913. 137 Pac. Rep. 73.

fact sixty-three, defeats only the policy pro tanto, and insurer is liable to the amount of the insurance which the premium paid would have purchased at the age of sixty-three.

(For other cases, see Insurance, Cent. Dig. § 671; Dec. Dig. § 290.)

6. TRIAL—INSTRUCTIONS—SUBMISSION OF ISSUE TO JURY. Where a fact defeating a recovery by plaintiff was established by uncontradicted evidence, it was error to submit the issue to the jury as one in dispute.

(For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.)

Appeal from District Court, Pueblo County; J. E. Rizer, Judge.

Action by Julia Klein against the Germania Life Insurance Company of New York City. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

F. A. Williams and G. Q. Richmond, both of Denver, for Appellant.
James A. Park and Benj. F. Koperlik, both of Pueblo, for Appellee.



SUPREME COLONY UNITED ORDER OF PILGRIM FATHERS *vs.* TOWNE, ET AL.*

(Supreme Court of Errors of Connecticut.)

1. INSURANCE—MUTUAL BENEFIT INSURANCE—CONTRACT.

Where applications for membership in a fraternal insurance order are forwarded to the home office, and, if in proper form and the applicant is found duly initiated and the fee for the benefit certificate paid, he is accepted, a benefit certificate being issued, the contract of insurance is effective when formally accepted by the insured; the place of the contract being the place of the insured's acceptance.

(For other cases, see Insurance, Cent. Dig. § 1851; Dec. Dig. § 713.)

2. INSURANCE—FRATERNAL INSURANCE—WHAT LAW GOVERNS.

Where a fraternal insurance contract was conditioned upon the laws of the state of the domicile of the society, and the constitution and by-laws of the society did not specify the classes of beneficiaries other than reciting the statute, such statute is a part of each contract, even though the contract is consummated in a foreign state.

(For other cases, see Insurance, Cent. Dig. §§ 1854, 1855; Dec. Dig. § 716.)

3. INSURANCE—FRATERNAL INSURANCE—BENEFICIARY INTEREST.

Where the statute of the state of the domicile of a fraternal insurance company provided that no beneficiary should have any vested interest in the benefit until it became due and payable upon the death of the member, and such statute was incorporated into the contract, a member's wife who died before him, although designated as beneficiary, had no vested interest which would survive to her administratrix.

* Decision rendered, Jan. 15, 1914. 89 Atl. Rep. 264.

(For other cases, see Insurance, Cent. Dig. §§ 1943, 1974; Dec. Dig. § 785.)

4. INSURANCE—FRATERNAL INSURANCE—DESIGNATION OF BENEFICIARY.

In cases of fraternal insurance, the member has the right to change the beneficiary after a designation, and hence the beneficiary on designation acquires, during the life of the member, merely an expectancy revocable at the member's pleasure.

(For other cases, see Insurance, Cent. Dig. § 1946; Dec. Dig. § 780.)

5. POWERS—POWERS OF APPOINTMENT.

A mere power of appointment is not an asset of the donee of the power and conveys no title to or interest in the property and, if unexercised by the donee prior to his death, is wholly inoperative.

(For other cases, see Powers, Cent. Dig. §§ 153, 154; Dec. Dig. § 39.)

6. INSURANCE — FRATERNAL INSURANCE — RIGHT OF MEMBER.

Where the by-laws of a fraternal insurance association made no provision for the payment of the benefit to the member's estate, if no beneficiary was designated, a member's estate takes no interest in the fund by reason of his failure to exercise his power of appointment, for such a power is not an asset in his hands.

(For other cases, see Insurance, Cent. Dig. § 1945; Dec. Dig. § 778.)

7. INSURANCE — FRATERNAL INSURANCE — PERSONS ENTITLED.

Where a member of a fraternal insurance order designated his wife as beneficiary and she died before him and he made no new designation, on a bill of interpleader filed by the insurer, the fund will be directed to be paid to the member's half-brother instead of the wife's administratrix; it appearing that neither the wife's administrator nor the member's administrator was entitled..

(For other cases, see Insurance, Cent. Dig. §§ 1943, 1974 Dec. Dig. § 785.)

Appeal from Superior Court, New Haven County; William H. Williams, Judge.

Interpleader by the Supreme Colony United Order of Pilgrim Fathers against Carrie Dixie Towne, administratrix, and others. From the judgment, the named defendant appeals. Reversed and remanded for correction.

Denis T. O'Brien, Jr., of Meriden, for Appellant.

Henry W. Stowell, of New Haven, for Appellee Terry.



C. E. SHEPARD & CO. vs. NEW YORK LIFE INS. CO.*

(Supreme Court of Errors of Connecticut.)

1. INSURANCE—RIGHTS OF BENEFICIARY.

Under an insurance policy providing for the payment of the amount thereof to insured's wife, or, if she died before insured, to his estate, and

* Decision rendered, Dec. 20, 1913. 89 Atl. Rep. 186.

also containing an endowment clause under which the amount was payable to the wife or her assigns twenty years after date, if the insured should then be living and the policy in force, the right of the wife and her assigns to the benefits of the endowment clause was not contingent upon her surviving insured, whether the contract was governed by the law of New York or that of Connecticut, as in both states the beneficiary, in the absence of inconsistent language, take a vested interest which passes at death to her legal representatives, and which after delivery of the policy cannot be divested by insured, the insurer, or both.

(For other cases, see Insurance, Dec. Dig. § 589.)

2. INSURANCE—ASSIGNMENT—RIGHTS OF ASSIGNEE—ESTOPPEL.

A life insurance policy, containing an endowment clause in favor of insured's wife and her assigns and containing no provision authorizing a change in the beneficiary at the time of the wife's death, was held by the company as security for a policy loan. It thereafter lapsed for nonpayment of interest and premiums, but at insured's request was reinstated and stamped with an indorsement that insured had changed the beneficiary to his executors, administrators, or assigns. A larger policy loan was thereafter made, and insured was furnished with a copy of the loan agreement and a paper showing the distribution of the proceeds of the new loan in payment of the current interest, premiums, and the old loan, and the remittance of the balance to insured. On an application furnished by the company required to be signed both by insured and the beneficiary, and which insured signed, naming his estate as beneficiary the endowment period was changed and the policy reissued as a fifteen-year endowment policy. Plaintiff, engaged in the business of buying up such policies, purchased the policy, filed duplicate copies of the assignment with the insurer, paid certain premiums, and prior to the expiration of the endowment period was invited by the company to elect which mode of settlement it would accept upon such expiration. Except for a few days, the policy was continually in possession of the company from the time of the first loan until after the bringing of suit by plaintiff, who did know that the wife was named in the endowment clause. *Held*, that the company was estopped as against plaintiff to deny that insured was the beneficiary of the policy, since plaintiff prior to the assignment was not charged as matter of law with knowledge that the endowment benefits were payable only to the wife or her assigns, and because of the insurer's conduct in putting into insured's hands papers indicating that he was the sole beneficiary, and, by dealing with the policy in a way inconsistent with the existence of any outstanding interest plaintiff was entitled to dispense with the necessity of examining the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1452, 1476-1478, 1481, 1482, 1485; Dec. Dig. § 593.)

Case Reserved from Superior Court, Hartford County; Gardiner Greene and Marcus H. Holcomb, Judges.

Action by C. E. Shepard & Co. against the New York Life Insurance Company to recover the cash value of an endowment policy of life insurance. Facts agreed upon, and questions of law reserved for the advice of the Supreme Court of Errors. Judgment advised for plaintiff.

Arthur L. Shipman, of Hartford, for Plaintiff.
William Brosmith, or Hartford, for Defendant.

ROYAL BENEFIT SOCIETY vs. NAYLOR. (No. 5,264.)*
 (Court of Appeals of Georgia.)

INSURANCE—LIFE INSURANCE—DEFAULT IN PREMIUMS.

A fraternal benefit policy provided that a lapsed policy could be reinstated with the consent of the society, provided that, at the time the payments for reinstatement were received at the home office, and at the expiration of fifteen days thereafter, insured was in good health; but if, at the expiration of fifteen days after the receipt of such payments, the member is not in good health, then the overdue payments and all subsequent payments shall upon demand be returned to insured. The payments for June and July, 1912, were not paid until August 6th, when insured's husband informed the agent that his wife was ill, but was improving, and paid him the amount of the premiums then overdue, and the premium for the month of August, 1912, was paid by the husband on August 8th, and insured died on August 10th. Held that, since insured died before the expiration of fifteen days after payment of the overdue premiums, the policy had lapsed at insured's death, so that no recovery can be had thereon.

(For other cases, see Insurance, Cent. Dig. § 1924; Dec. Dig. § 761.)

Russell, C. J., dissenting.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.
Action by Andrew Naylor against the Royal Benefit Society. Judgment for plaintiff, and defendant brings error. Reversed.

Oliver & Oliver and W. S. Connerat, all of Savannah, for Plaintiff in Error.
Twiggs & Gazan, of Savannah, for Defendant in Error.

* Decision rendered, Jan. 20, 1914. 80 S. E. Rep. 545.



**CREAT WESTERN LIFE ASSUR. CO. vs. STATE EX REL.
 HONAN, ATTY. GEN., ET AL. (No. 22,334.)***
 (Supreme Court of Indiana.)

INSURANCE—INSURANCE COMPANIES—ACTION FOR DISSOLUTION—VENUE.

Burns' Ann. St. 1908, § 314, providing that any action against any domestic corporation may be brought in any county where such corporation has an office or agency for the transaction of business, or in which any person resides upon whom process may be served against such corporation, and section 319, providing that process against corporations may be served upon certain officers or agents, and that, if no such person, officer, or agent be found in the county where suit is pending, process may be sent for service to any other county in the state where such person, officer, or agent may be found, do not authorize the At-

* Decision rendered, Jan. 13, 1914. 103 N. E. Rep. 843.

torney General to bring a suit against an insurance corporation for a receivership and a dissolution in any county other than that where the corporation's home office is located.

(For other cases, see Insurance, Cent. Dig. § 57; Dec. Dig. § 49.)

On petition for rehearing. Denied.

For former opinion, see 102 N. E. 849.



MULHERIN vs. BANKERS' LIFE ASS'N.*

(Supreme Court of Iowa.)

1. INSURANCE—MUTUAL BENEFIT INSURANCE—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action on benefit insurance certificates, which defendant alleged had lapsed for nonpayment of an assessment, evidence, held sufficient to show nonpayment, though the assessment was payable either to the association or to an authorized depository bank.

(For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.)

2. INSURANCE—MUTUAL BENEFIT INSURANCE—NOTICE OF ASSESSMENT.

Where the laws of a benefit insurance society authorized the board of directors to provide funds in advance for the payment of any claims which might be anticipated during the three months next ensuing, a notice of an assessment stating that it was made to provide a benefit fund for death losses sufficiently complied with Code, § 1788, requiring notices of assessment by assessment life insurance associations to state the objects to which the money to be collected is to be devoted, and a provision of the by-laws requiring such notices to contain a statement of the objects for which the money to be collected was intended, although the purpose of the assessment was in part to provide a fund out of which to pay anticipated death losses.

(For other cases, see Insurance, Cent. Dig. § 1884; Dec. Dig. § 737.)

3. INSURANCE—MUTUAL BENEFIT INSURANCE—DUES—LIABILITY.

The waiver of a forfeiture of a benefit insurance certificate for nonpayment of an assessment left the payment thereof still optional and did not render insured personally liable in violation of a provision of the by-laws that no personal liability would be incurred beyond the payment of guaranty notes.

(For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.)

Appeal from District Court, Linn County; Milo P. Smith, Judge.

Action on three certificates of life insurance resulted in judgment as prayed. The defendant appeals. Reversed.

I. M. Earle, of Des Moines, and Grimm, Trewin & Randall, of Cedar Rapids, for Appellant.

J. H. Preston, Ed Preston, and Tourtellot & Donnelly, all of Cedar Rapids, for Appellee.

* Decision rendered, Jan. 14, 1914. 144 N. W. Rep. 1000.

FILLEY VS. ILLINOIS LIFE INS. CO. ET AL.*
 (Supreme Court of Kansas.)

INSURANCE—WIFE AS BENEFICIARY—EFFECT OF DIVORCE.
 The benefit accruing from a policy of life insurance, upon the life of a married man, payable upon his death to his wife, naming her, is payable to the surviving beneficiary named, although she may have years thereafter secured a divorce from her husband and he was thereafter again married to one who sustained the relation of wife to him at the time of his death.

(For other cases, see Insurance, Cent. Dig. §§ 1461-1468; Dec. Dig. § 585.)

Appeal from District Court, Shawnee County.

Action by Mrs. Clarence E. Filley against the Illinois Life Insurance Company and others. From judgment for defendants, plaintiff appeals. Affirmed.

E. S. Quinton and Waters & Waters, all of Topeka, for Appellant.

T. M. Lillard, of Topeka, and Stavely & Stavely, of Lyndon, for Appellees.

* Decision rendered, Jan. 10, 1914. 137 Pac. Rep. 793. Syllabus by the Court.

NOBLE VS. SOUTHERN STATES MUT. LIFE INS. CO.*
 (Court of Appeals of Kentucky.)

1. **INSURANCE—LIFE POLICY—COVENANT TO PAY PREMIUMS.**

A contract of life insurance is *sui generis*, and while it provides for renewal after the first year by the payment of subsequent premiums without any agreement on the part of insured to pay such premiums, and such payment may not be enforced by the insurance company except by forfeiture of the policy, the contract cannot be construed though insured's covenant to pay premiums was independent of insurer's covenant to pay the policy, so that insured's agreement to pay as distinguished from actual payment would be sufficient to keep the policy alive; nor is this affected by a provision that the policy shall be undisputable for breach of any of its conditions after the first year.

(For other cases, see Insurance, Cent. Dig. §§ 891, 895-902, 913; Dec. Dig. § 349.)

2. **INSURANCE—LIFE POLICY—PAYMENT OF PREMIUMS—ACTION—PETITION.**

A Policy of life insurance was issued December 21, 1907, providing for quarterly premium payments in advance on the 21st day of March,

* Decision rendered, Jan. 21, 1914. 162 S. W. Rep. 528.

June, September, and December. It also provided that failure to pay any premium should avoid the policy, and that after one year the policy should be indisputable for breach of any of its provisions. Insured died December 15, 1910, and the petition in the action on the policy alleged that he paid to defendant \$113.75 as provided therein, and a like sum in March, June, and September next following the issuance of the policy, and at the expiration of the first year he renewed the policy as a whole life participating policy by paying the quarterly payments due in December, 1908, and in March and June, 1909, respectively. Held that the petition was demurrable for failure to allege that the premiums due in December, 1909, and in March and June, 1910, had been paid.

(For other cases, see Insurance, Cent. Dig. §§ 1593, 1596, 1598, 1603-1606, 1608; Dec. Dig. § 634.)

Appeal from Circuit Court, Jefferson County; Common Pleas Branch, Fourth Division.

Action by Ida E. Noble against the Southern States Mutual Life Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Gibson & Crawford, of Louisville, and Clark Varnum, of Chicago, Ill., for Appellant.

Burnett, Batson & Cary, of Louisville, for Appellee.



WILLIAMS vs. HARTH.*

(Court of Appeals of Kentucky.)

1. FRAUDULENT CONVEYANCES — PREMIUMS ON INSURANCE POLICIES.

Under Ky. St. § 654, providing that if the premium on any policy of insurance mentioned in that section is paid by any person with intent to defraud creditors, an amount equal to the premium so paid, with interest thereon, shall inure to the benefit of creditors, the acceptance by the beneficiary of the amount of the policy and the investment thereof in real estate does not constitute her a fraudulent grantee.

(For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 56, 57, 158; Dec. Dig. § 39.)

2. FRAUDULENT CONVEYANCES—ASSETS—INSURANCE PREMIUMS FRAUDULENTLY PAID.

Under Ky. St. § 654, providing that if the premium on any life insurance policy mentioned in that section is paid by any person with intent to defraud his creditors, an amount equal to the premium so paid, with interest thereon, shall inure to the benefit of such creditors, the premiums so paid are a trust fund for the creditors, which passes to the personal representative as a part of insured's estate, whether recovered from the beneficiary by the personal representative or a creditor, and the creditor, instituting an action for its recovery and obtaining a lis pendens lien on property in which the fund has been

* Decision rendered, Jan. 8, 1914. 161 S. W. Rep. 1102.

Invested by the beneficiary, acquires no priority over the other creditors.

(For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 138-142, 148, 150-158; Dec. Dig. § 57.)

3. EXECUTORS AND ADMINISTRATORS—ACTIONS—PARTIES CREDITORS.

Under such section the personal representative of the person paying such premiums should sue for their recovery, but in the event of his refusal to do so, a creditor may bring the action for himself and all other creditors, to which action all creditors should be made parties. (For other cases, see Executors and Administrators, Cent. Dig. §§ 1660, 1660½; Dec. Dig. § 423.)

RAUDULENT CONVEYANCES — PREMIUMS ON INSURANCE POLICIES.

Ky. St. §§ 654, 655, providing that the amount of insurance premiums paid in fraud of creditors, with interest thereon, shall inure to the benefit of such creditors, do not apply to premiums paid to fraternal insurance organizations, in view of section 671, providing that the money or other benefit paid by any co-operative or assessment insurance society shall be exempt from execution, and not liable to seizure by any legal or equitable process for the debt or liability of a member.

(For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 56, 57, 158; Dec. Dig. § 39.)

5. EXECUTORS AND ADMINISTRATORS—ACTIONS—SET-OFFS.

Under Ky. St. § 654, providing that the amount of insurance premiums paid in fraud of creditors, with interest thereon, shall inure to the benefit of such creditors, in an action against a beneficiary to recover the amount of premiums so paid, she was not entitled to set off a note due her from insured, since she owed insured during his lifetime no part of the fund sought to be recovered, but held it impressed with a trust in behalf of creditors, and owed it to them, and hence the court properly relegated her claim on the note to settlement in the action pending for the settlement of insured's estate.

(For other cases, see Executors and Administrators, Cent. Dig. §§ 1698-1715; Dec. Dig. § 434.)

Appeal from Circuit Court, McCracken County.

Action by J. W. Williams and others against Jennie F. Harth, which were consolidated. From the judgment, the plaintiff named appeals, and defendant cross-appeals. Affirmed.

Bradshaw & Bradshaw, of Paducah, for Appellant.
Morton & Morton, of Morganfield, for Appellee.

GRAND LODGE A. O. U. W. *vs.* EDWARDS ET AL.*

(Supreme Judicial Court of Maine.)

1. INSURANCE—FRATERNAL BENEFICIARY ASSOCIATION—CONSTITUTION AND BY-LAWS AS PART OF CONTRACT.

The constitution and laws of a fraternal beneficiary association, so far as applicable to its beneficiary contracts, form a part of the contract itself. (For other cases, see Insurance, Cent. Dig. § 1854; Dec. Dig. § 718.)

2. INSURANCE—FRATERNAL BENEFICIARY ASSOCIATION—PERSONS ENTITLED TO BENEFITS.

Under the express general law of a fraternal beneficiary association that, if all the beneficiaries under a certificate died during the lifetime of a member and he should have made no other legal designation, the benefit should be paid to his widow, or, if he left no widow surviving him, then to be paid share and share alike to his children, etc., the surviving widow of a member whose first wife, the beneficiary named therein, had died, leaving one child, in the absence of any legal designation of any other beneficiary, was entitled to the benefits.

(For other cases, see Insurance, Cent. Dig. §§ 1943, 1974; Dec. Dig. § 785.)

3. INSURANCE—ACTION ON CERTIFICATE—BURDEN OF PROOF—CHANGE OF BENEFICIARY.

One relying on the change in a beneficiary contract whereby a new beneficiary is designated in place of those who would otherwise be entitled to it under the original certificate must show that the change has been made in the manner provided for in the laws of the association.

(For other cases, see Insurance, Cent. Dig. §§ 1999-2002; Dec. Dig. § 817.)

4. INSURANCE — BENEFICIARIES — CHANGE OF BENEFICIARIES—“LEGAL DESIGNATION.”

Under the general law of a beneficiary association prescribing the beneficiaries under a certificate where the member has made no other “legal designation,” and the law as to the designation of new beneficiaries requiring that the direction therefor be made in the form prescribed, signed by the member in the presence of and attested by the recorder of his lodge and accompanied by the certificate of the lodge under its seal to be forwarded with the certificate to the Grand Recorder, a letter from a member to his son, expressing his intent and purpose that at his death the son should have the benefit, did not constitute a “legal designation” of the son as the beneficiary of the fund.

(For other cases, see Insurance, Cent. Dig. § 1939; Dec. Dig. § 773.)

Report from Supreme Judicial Court, Androscoggin County, in Equity. Bill of interpleader by Grand Lodge Ancient Order of United Workmen against Harold M. Edwards and Maude M. Edwards. Case reported for determination upon the appeal, answers, decree of interpleader, and other evidence. Ordered that Maude M. Edwards, the surviving widow of the holder of a certificate in such Grand Lodge, be entitled to payment of the fund due thereon.

Argued before Savage, C. J., and Spear, Cornish, King, and Haley, JJ.

* Decision rendered, Dec. 31, 1913. 89 Atl. Rep. 147.

L. L. Walton, of Skowhegan, for Plaintiff.

McGillicuddy & Morey, of Lewiston, for Defendant Harold M. Edwards.

W. B. Skelton, of Lewiston, for Defendant Maude M. Edwards.



WILLIAMS *vs.* NEW YORK LIFE INS. CO., INC.*

(Court of Appeals or Maryland.)

1. INSURANCE — ACTION ON POLICY — PLEADING — EXECUTION OF CONTRACT.

Under the statute, the execution of a contract of insurance is a question of fact which must be pleaded if the insurer defending an action thereon desires to put the execution in issue.

(For other cases, see Insurance, Cent. Dig. §§ 1554, 1632-1644; Dec. Dig. § 645.)

2. INSURANCE—ACTION ON POLICY—QUESTION FOR JURY—CONSTRUCTION.

The proper interpretation of a contract of insurance is a question of law for the court.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

3. APPEAL AND ERROR—REVIEW—QUESTIONS CONSIDERED.

Under the express terms of Code Pub. Civ. Laws, art. 5, § 9, no question will be passed on in the Court of Appeals which does not plainly appear by the record to have been decided by the court below.

(For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2298; Dec. Dig. § 500.)

4. EVIDENCE—PAROL EVIDENCE TO CONTRADICT WRITING—INSURANCE POLICY.

Parol evidence is inadmissible to contradict the terms of a written policy of insurance.

(For other cases, see Evidence, Cent. Dig. §§ 1818-1824; Dec. Dig. § 405.)

5. EVIDENCE—PAROL EVIDENCE TO EXPLAIN WRITING—CONFIRMATION OF TERMS OF POLICY.

Parol evidence is inadmissible to confirm the terms of a written insurance policy, where no ambiguity is alleged.

(For other cases, see Evidence, Cent. Dig. §§ 1818-1824; Dec. Dig. § 405.)

6. EVIDENCE—REPRESENTATIONS OF AGENT—MERGER IN CONTRACT.

Whatever representations were made by an insurance agent, as to certain figures relating to the policy, were merged in the contract.

(For other cases, see Evidence, Cent. Dig. §§ 1818-1824; Dec. Dig. § 405.)

7. INSURANCE — CONSTRUCTION — SLIP ATTACHED TO POLICY.

The mere fact of the fastening of a slip to a policy cannot make it a part

* Decision rendered, Dec. 19, 1913. 89 Atl. Rep. 97.

of the contract, where there is no reference on either policy or slip of the one to the other.

(For other cases, see *Insurance*, Cent. Dig. §§ 305-307; Dec. Dig. § 150.)

8. INSURANCE—CONSTRUCTION—"STATEMENT" AS TO SETTLEMENT.

A twenty-premium accumulation life policy, exactly of the kind applied for by insured, provided that at the end of the accumulation period insured would be entitled to receive "the dividend then apportioned by the company," and had pasted on one page a typewritten paper, entitled "Statement," purporting to show the terms of settlement at the end of the accumulation period, and including one option showing a cash value, above reserve, of \$3,827.20. *Held*, in view of the necessarily uncertain amount of dividends payable at the end of such period, and that the most it was possible to do was to estimate what the amount would be, that the word "statement" did not imply a definite guaranteed cash payment at the end of the term, but was in the nature of an estimate of such amount.

(For other cases, see *Insurance*, Cent. Dig. §§ 305-307; Dec. Dig. § 150.)

(For other definitions, see *Words and Phrases*, vol. 7, p. 6643.)

9. INSURANCE—STIPULATION AS TO CONSTRUCTION—VALIDITY.

An express stipulation, in an application for life insurance made in this state, that the contract contained therein, and the policy, should be construed according to the law of the state of New York was a stipulation which the parties were competent to make.

(For other cases, see *Insurance*, Cent. Dig. § 293; Dec. Dig. § 147.)

10. INTEREST—JUDGMENT.

Where the holder of a twenty-premium life policy declined at its expiration to accept the dividend apportioned by the company, and brought suit on the policy for a larger amount, but moved for judgment for the amount admitted to be due, for which judgment was rendered, the dispute as to the amount due took the case out of the general rule that where a definite sum of money is payable at the expiration of a time certain without demand, interest is generally allowed from the time the money should have been paid, so that he was not entitled to interest on the amount of the judgment.

(For other cases, see *Interest*, Cent. Dig. §§ 43-53; Dec. Dig. § 22.)

"To be officially reported."

Action by John Whitridge Williams against the New York Life Insurance Company, Inc. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before Briscoe, Burke, Thomas, Urner, Stockbridge, and Constable, JJ.

GEDDES vs. ANN ARBOR RAILROAD EMPLOYEES' RELIEF ASS'N.*

(Supreme Court of Michigan.)

1. INSURANCE—MUTUAL BENEFIT INSURANCE—DEFAULT IN PREMIUMS.

When decedent became an employee of a railroad company which also maintained a relief association, he signed an application for insurance in such association, which recited, "I hereby authorize" the railroad company "to deduct from my wages the monthly premium required for my insurance under said policy, as such premium shall, from time to time, become due," and the policy provided that, if a member failed to pay any monthly payment when due insurance should immediately cease, but did not in terms obligate the railroad company to deduct the assessments from insured's wages and forward them to the relief association. The treasurer of the relief association made out a deduction sheet each month and forwarded it to the auditing department of the railroad company and included the decedent's name in such list, but through an error in the auditing department the sheet was returned with "No time" inserted opposite decedent's name, and, after being so returned for three or four months, decedent's name was dropped from the list. While the assessments were usually collected through the auditing department of the railroad company, some of the employees insured made payments directly to the relief association. Held that, since decedent had never paid any assessments, recovery could not be had on his policy; the railroad company not being bound to collect such assessments from his wages.

(For other cases, see Insurance, Cent. Dig. § 1906; Dec. Dig. § 754.)

2. INSURANCE—MUTUAL BENEFIT INSURANCE—DEFAULT IN PREMIUMS — NOTICE.

If one insured in an employees' mutual benefit association actually knew that his premiums had not been paid from the fact that he had drawn his full wages each month and had not otherwise paid them, it was not necessary that he be given notice by the association of that fact, even if the policy required such notice.

(For other cases, see Insurance, Cent. Dig. §§ 1917, 1918; Dec. Dig. § 756.)

Ostrander, J., dissenting.

Error to Circuit Court, Washtenaw County; Edward D. Kinne, Judge.
Action by Warren Geddes against the Ann Arbor Railroad Employees' Relief Association. Judgment for plaintiff, and defendant brings error. Reversed, without new trial.

Seth Q. Pulver, of Owosso, for Appellant.

~~et al.~~ Dewey M. Forshee, of Ann Arbor (Carl Storm, of Detroit, of counsel) for Appellee.

Decision rendered, Jan. 5, 1914. 144 N. W. Rep. 828.

COURT OF HONOR *vs.* HERING.*

(Supreme Court of Michigan.)

1. EQUITY—RETENTION OF JURISDICTION ACQUIRED.

Where a benefit insurance society brought a suit to cancel a certificate and enjoin actions thereon on the ground of fraudulent representations and nondelivery of the certificate, and the allegations of fraud were made in good faith, a court of equity should have retained jurisdiction and granted the relief prayed for, where it appeared that the certificate was not delivered to the applicant while he was in good health, though the fraud alleged was not proved.

(For other cases, see Equity, Cent. Dig. §§ 116-118; Dec. Dig. § 41.)

2. INSURANCE—MUTUAL BENEFIT INSURANCE—DELIVERY AND ACCEPTANCE OF CERTIFICATE.

In an application for a benefit insurance certificate, the applicant represented that he was in sound bodily and mental health, agreed to waive all claims to benefits until the certificate should have been delivered to him while in good health, professed to be acquainted with the rules of the association, and agreed to be bound thereby. One of the rules provided that no certificate should be in force until the applicant was initiated or obligated and signed and accepted the certificate, and that, before the recorder should deliver a certificate, the applicant must in person while in good health sign the certificate in his presence. The applicant was initiated, but the certificate in the regular course of business was not received by the society's local officers until several days later, and in the meantime the applicant had been taken to a hospital suffering from general paresis, from which he subsequently died. The certificate was not delivered to him or to any person for him and was not demanded by him. *Held*, that the rule in question not having been complied with, and compliance therewith not having been waived, the certificate was not a binding contract.

(For other cases, see Insurance, Cent. Dig. § 1856; Dec. Dig. § 720.)

Appeal from Circuit Court, Wayne County, in Chancery; George P. Codd, Judge.

Suit by Court of Honor against Minnie Hering. From a decree for defendant, complainant appeals. Reversed, and decree entered in favor of complainant.

Argued before Steere, C. J., and Moore, McAlvay, Brooke, Kuhn, Stone, Ostrander, and Bird, JJ.

Beaumont, Smith & Harris, of Detroit, for Appellant.
McHugh, Gallagher, O'Neill & McGann, of Detroit, for Appellee.

* Decision rendered, Jan. 5, 1914. 144 N. W. Rep. 843.

ARENSMEYER vs. METROPOLITAN LIFE INS. CO.*

(Supreme Court of Missouri, Division No. 1.)

1. INSURANCE—AGENTS—RENEWAL COMMISSIONS—TERMINATION OF EMPLOYMENT.

The contract of an agent of a life insurance company expressly terminating his right to commissions on termination of his employment, he is not entitled to renewal commissions on premiums payable after his retirement.

(For other cases, see Insurance, Cent. Dig. §§ 111-114; Dec. Dig. § 84.)

2. INSURANCE—AGENTS—COMMISSIONS—CHANGE OF CONTRACT.

The provision of an insurance agent's contract, terminating his right to renewal commissions on termination of his employment, is not abrogated by the company changing, as authorized by the contract, such commissions on future business.

(For other cases, see Insurance, Cent. Dig. §§ 111-114; Dec. Dig. § 84.)

3. INSURANCE—AGENTS—COMMISSIONS—CHANGE IN CONTRACT.

The provision of an insurance agent's contract, terminating his right to renewal commissions on termination of his employment, is not abrogated by a mere equitable adjustment of his rights in renewal commissions on his transfer from one district to another.

(For other cases, see Insurance, Cent. Dig. §§ 111-114; Dec. Dig. § 84.)

4. APPEAL AND ERROR — HARMLESS ERROR — REFERRING CASE.

Referring a case, if error, was harmless to plaintiff, his right being grounded on written and printed documents, showing him to have no case.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4122, 4123; Dec. Dig. § 1044.)

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Action by William E. Arensmeyer against the Metropolitan Life Insurance Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Reynolds & Harlan, of St. Louis, for Appellant.

Nathan Frank and Richard A. Jones, both of St. Louis, for Respondent.

* Decision rendered, Jan. 3, 1914. 162 S. W. Rep. 261.

LANGE vs. NEW YORK LIFE INS. CO.*

(Supreme Court of Missouri, Division No. 2.)

1. INSURANCE—LIFE POLICY—WHAT LAW GOVERNS.

Where an application for a life policy was made and the policy was delivered in New Mexico, it was a New Mexico contract, and could only be governed by the laws of another state by virtue of a provision to that effect in the policy.

(For other cases, see Insurance, Cent. Dig. §§ 173-175; Dec. Dig. § 125.)

2. INSURANCE — POLICY — PROVISIONS — CONSTRUCTION —PREMIUMS—NOTICE OF MATURITY—WAIVER.

Where a New Mexico policy of life insurance provided that it should be construed as though executed in New York, and also declared that notice that each and every payment of premium was due at the date named in the policy, was given and accepted by the delivery and acceptance of the policy, and every further notice required by any statute was expressly waived, such specific provision covered the general one that the policy was governed by the laws of New York, and waived a New York statute prohibiting forfeiture for nonpayment of premiums, in the absence of notice of the maturity thereof, given by mail to the insured or the assignee of the policy.

(For other cases, see Insurance, Cent. Dig. §§ 173-175; Dec. Dig. § 125.)

3. INSURANCE — LIFE POLICY — FORFEITURE — ESTOPPEL — FINDINGS—EVIDENCE.

In an action on a life insurance policy by an assignee, evidence held to warrant a finding that defendant was estopped by acts of its cashier to claim a forfeiture for nonpayment of the semiannual premium due Nov. 24, 1905.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

4. INSURANCE — LIFE POLICY — AGENTS — AUTHORITY OF CASHIER.

Where defendant's cashier in charge of a branch office for the territory of New Mexico had authority to collect premiums, accept premium notes, and transact the company's business generally, he was authorized to bind defendant by giving out information concerning the value of policies, and to represent to an assignee of a policy that only \$18.40 was necessary to pay a semiannual premium on the assigned policy.

(For other cases, see Insurance, Cent. Dig. §§ 180-182, 1849, 1850; Dec. Dig. § 129.)

5. ESTOPPEL.—ESTOPPEL IN PAIS—WILLFULNESS.

Concealment or misleading statements need not necessarily be intentionally false in order to create an estoppel in pais, it being sufficient that the party has been induced to act by reason of the concealment or misrepresentations so that to enable the other party to allege the contrary would constitute a fraud.

(For other cases, see Estoppel, Cent. Dig. §§ 218, 227-229; Dec. Dig. § 83.)

* Decision rendered, Dec. 9, 1913. Rehearing denied, Jan. 6, 1914. 162 S. W. Rep. 589.

6. PLEADING — PETITION—COUNTS — INCONSISTENCY — ELECTION.

Plaintiff, as assignee of a life insurance policy, sued thereon, alleging in the first count of the petition a cause of action on the theory that the November, 1905, semiannual premium had not been paid, and that the net reserve value of the policy at the time of failure to pay such premium was sufficient to have purchased temporary insurance to the face value of the policy for a period beyond the date of insured's death. The second count alleged a cause of action on the theory that the premium due was not paid, but that defendant was estopped to claim that the policy had thereby lapsed, and that defendant had also failed to give notice of the maturity of the premium as required by a New York statute, for which reason defendant was liable for the full amount of the policy less a loan which had been granted thereon, and the third count proceeded on the theory that, though the policy had lapsed for nonpayment of the November, 1905, premium, plaintiff was still entitled to recover an amount equal to as many twentieth parts of the face of the policy as there had been complete annual premiums paid. *Held* that, while some of the facts necessary to prove the allegations of one count were not required to prove the allegations of either of the others, yet the facts necessary to prove any one did not disprove or positively contradict those necessary to prove either of the others; and hence, the counts were not so inconsistent as to require an election.

(For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.)

Appeal from Circuit Court, Henry County; C. A. Denton, Judge.

Action by Otto Lange against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lathrop, Morrow, Fox & Moore, and O. W. Pratt, all of Kansas City, for Appellant.

Botsford, Deatherage & Creason, of Kansas City, for Respondent.



KEILY ET AL. vs. KNIGHTS OF FATHER MATHEW.*

(St. Louis Court of Appeals. Mo.)

1. IN SURANCE—MUTUAL BENEFIT INSURANCE—PRESUMPTIONS AND BURDEN OF PROOF.

In an action on a benefit insurance certificate, where the certificate was introduced in evidence and the death of the member established, a *prima facie* case was made by the beneficiaries, and the burden was on the defendant to establish its defense that the member resigned from the order prior to his death, since the status of the member, as such, was presumed to continue until the contrary was made to appear.

(For other cases, see Insurance, Cent. Dig. §§ 1999-2002; Dec. Dig. § 817.)

2. IN SURANCE—MUTUAL BENEFIT INSURANCE—QUESTIONS FOR JURY.

In an action on a benefit insurance certificate, evidence held to make a question for the jury as to whether the member resigned from the

* Decision rendered Dec. 31, 1913. 162 S. W. Rep. 682.

order in his lifetime, as alleged by defendant, and hence a verdict for defendant was improperly directed.

(For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.)

3. INSURANCE—MUTUAL BENEFIT INSURANCE—RESIGNATION FROM ORDER.

Unless the compact between the members of a voluntary association otherwise provides, a member may withdraw from it at any time without the consent of the association, and hence, where a member resigned in open meeting, it was not essential that the order should act upon the resignation in order to terminate the relations between it and the member.

(For other cases, see Insurance, Cent. Dig. §§ 1834, 1835; Dec. Dig. § 694.)

4. EVIDENCE—WEIGHT AND SUFFICIENCY—NEGATIVE EVIDENCE.

On the question of whether a member of a benefit insurance society resigned therefrom in open meeting, the testimony of a witness present at such meeting that he heard no such announcement by the member had probative force and was to be received and considered with the other facts and circumstances, since a negative fact may be shown by negative evidence.

(For other cases, see Evidence, Cent. Dig. §§ 435-437; Dec. Dig. § 147.)

5. INSURANCE—MUTUAL BENEFIT INSURANCE—QUESTIONS FOR JURY.

In an action on a benefit insurance certificate, where the beneficiaries introduced the certificate and proved the death of the member, thereby making a *prima facie* case, the question of whether the member resigned from the order in his lifetime was for the jury, even though there was no evidence to rebut that introduced by defendant to show such resignation, since a *prima facie* case once made may not be declared by the court, as a matter of law, to be overcome by the introduction of mere oral evidence and facts in *pais short of admissions*, even though such evidence appears to be abundant to do so and remains uncontradicted.

(For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.)

Appeal from St. Louis Circuit Court; Geo. C. Hitchcock, Judge.

Action by Maurice Keily and others against the Knights of Father Mathew. From an order setting aside a judgment of involuntary nonsuit, defendant appeals. Affirmed.

Ryan & Thompson, of St. Louis, for Appellant.

Johnson, Rutledge, Marlatt & Lashiy, of St. Louis, for Respondents.

**WITT vs. OLD LINE BANKERS' LIFE INS. CO.
(No. 18,080.)***

(Supreme Court of Nebraska.)

1. INSURANCE—RECOVERY OF PREMIUM—RIGHT OF ACTION—RESCISSON OF CONTRACT.

In an action to recover an advanced premium paid on an application for a policy of life insurance, where plaintiff alleges that he has refused to submit to such a medical examination as was provided for in the application and requested by the company, it is incumbent on the plaintiff to allege and prove that the contract has been rescinded, or facts which amount in law to such a rescission, in order to maintain the action.

(For other cases, see Insurance, Cent. Dig. §§ 457-467; Dec. Dig. § 198.)

2. INSURANCE—RECOVERY OF PREMIUM—RIGHT OF ACTION—RESCISSON OF CONTRACT.

The averments of the plaintiff's amended petition examined, and found to be insufficient to sustain a judgment in his favor.

(For other cases, see Insurance, Cent. Dig. §§ 457-467; Dec. Dig. § 198.)

Appeal from District Court, Dodge County; Hollenbeck, Judge.

Action by John Witt against the Old Line Bankers' Life Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed. See, also, 139 N. W. 639.

Courtright & Sidner, of Fremont, for Appellant.

G. L. Loomis, of Fremont, and C. Petrus Peterson, of Lincoln, for Appellee.

* Decision rendered, Dec. 24, 1913. Concurring opinion, Jan. 7, 1914.
144 N. W. Rep. 801. Syllabus by the Court.

McILLON vs. UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA.*

(Supreme Court of New Hampshire. Coos.)

INSURANCE—FRATERNAL INSURANCE.

The by-laws of a fraternal insurance association provide that monthly dues shall be charged on the books on the first of each month, but that a member does not fall in arrears until the end, and that when a member owes a sum equal to three months' dues he is not a member in good standing, and will not again be in benefit until three months after his arrearages have been paid in full. A member failed to pay his dues for January, February, March, and April until April the 17th, and he died in the following June. Held, that

* Decision rendered, Dec. 2, 1913. 89 Atl. Rep. 301.

even though the dues did not fall in arrears until the end of the month, the member at the time of the payment was in arrears for the January, February, and March dues, and hence his estate could not recover.

(For other cases, see Insurance, Cent. Dig. § 1926; Dec. Dig. § 764.)

Exceptions from Superior Court, Coos County; Chamberlin, Judge. Assumpsit by Katherine McGillon, as administratrix, against the United Brotherhood of Carpenters & Joiners of America. There was a verdict for defendant, and plaintiff excepted. Exceptions overruled.

Matthew J. Ryan and Goss & James, all of Berlin, for Plaintiff. Sullivan & Daley, of Berlin, for Defendant.

HINES *vs.* MODERN WOODMEN OF AMERICA ET AL.*

(Supreme Court of Oklahoma.)

1. INSURANCE—FRATERNAL BENEFIT SOCIETY—EFFECT OF REGULATIONS—CONTRACT OF INSURANCE.

The terms of a contract between a fraternal benefit society and its members are to be determined by the constitution and laws of the society as they exist at the beginning of the membership, and as they may be lawfully amended from time to time thereafter, and by agreement made pursuant thereto between the incoming members and the society.

(For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.)

2. INSURANCE—FRATERNAL BENEFIT SOCIETY—POWER TO CHANGE REGULATIONS—CONTRACT OF INSURANCE.

The power accorded to such a society in its charter to alter and repeal its constitution, by-laws, rules, and regulations enters in and forms part of the contract of insurance between the society and its members, when the latter, as applicant for membership, promises not only to conform to and abide by the constitution and laws of the society as they then exist but also as they may be thereafter altered or amended.

(For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.)

3. INSURANCE—FRATERNAL BENEFIT SOCIETY—RIGHT TO CHANGE REGULATIONS.

Such reserve powers of amendment and repeal do not, however, give the society any right to adopt a by-law which will divest, impair, or disturb the rights once vested in its members, for such a by-law would be unreasonable.

(For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.)

4. INSURANCE—FRATERNAL BENEFIT CERTIFICATE—RIGHTS OF BENEFICIARY.

A beneficiary named in a fraternal benefit certificate only acquires a

* Decision rendered, Dec. 20, 1913. 137 Pac. Rep. 675. Syllabus by the Court.

vested right in the benefits accruing thereunder on the member's death.

(For other cases, see Insurance, Cent. Dig. § 1949; Dec. Dig. § 783.)

5. INSURANCE—FRATERNAL BENEFIT SOCIETY—AMENDMENT TO BY-LAWS—EFFECT OF DEATH OF BENEFICIARY.

Though a benefit certificate, naming the member's mother as beneficiary, provided that, in case of death of the beneficiary before death of the member, a failure by him to designate another beneficiary, the benefit should be paid to his heirs, a like provision was in the by-laws in force when the certificate was issued; yet it being provided in the application that the association's laws "now in force or hereafter enacted" enter into and become a part of every contract between it and a member and govern all rights thereunder, and it being declared by the by-laws a purpose of the association to furnish indemnity to the beneficiaries of members, "in accordance with the articles of association, by-laws, rules, and regulations" of the association, not inconsistent with the laws of the state, a change in the by-laws, whereby, on death of the named beneficiary and failure of the member to make a new designation, his wife at the time of his death should take, in preference to his heirs, being reasonable and in harmony with the general purpose of the association, and not in derogation of any right secured to him, and fully authorized by the terms of the contract, governed.

(For other cases, see Insurance, Cent. Dig. § 1945; Dec. Dig. § 778.)

Commissioners' Opinion, Division No. 2. Error from District Court, Kingfisher County; Jas. B. Cullison, Judge.

Action by Maggie E. Hines against the Modern Woodmen of America and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

F. L. Boynton, of Kingfisher, for Plaintiff in Error.

Hinch & Bradley, of Kingfisher, for Defendant in Error Redmond.



**JOHN HANCOCK MUT. LIFE INS. CO. vs. BEDFORD
ET AL.***

(Supreme Court of Rhode Island.)

1. INSURANCE—BENEFICIARIES—RIGHT TO CHANGE.

A beneficiary under a life insurance policy which provided that insured might change the beneficiary from time to time had no vested interest preventing insured from changing the beneficiary whenever he desired to do so, if he sufficiently complied with the terms of the policy in effecting the change.

(For other cases, see Insurance, Cent. Dig. § 1470; Dec. Dig. § 586.)

2. INSURANCE—RIGHTS OF BENEFICIARIES—POSSESSION OF POLICY.

Insured's wife, who was named as beneficiary in a policy which provided that insured might change the beneficiary from time to time, but

* Decision rendered, Jan. 2, 1914. 89 Atl. Rep. 154.

that no change would bind the company unless indorsed on the policy by the president or secretary, and to whom the policy was delivered by insured, presumably for safe keeping, had no right to its possession as against insured.

(For other cases, see Insurance, Cent. Dig. §§ 1461-1468; Dec. Dig. § 585.)

3. INSURANCE—CHANGE OF BENEFICIARY—WAIVER OF OBJECTIONS.

Where the holder of a policy which provided that he might change the beneficiary from time to time by filing a notice thereof, but that no change would bind the company unless indorsed on the policy by the president or secretary, attempted to change the beneficiary without surrendering the policy for such indorsement, and after his death the company filed a bill of interpleader to determine whether the funds should be paid to the original or substituted beneficiary, it thereby waived its objections to the change.

(For other cases, see Insurance, Cent. Dig. § 1469; Dec. Dig. § 587.)

4. INSURANCE—CHANGE OF BENEFICIARY—ACTS CONSTITUTING.

Where the beneficiary under a policy, which authorized insured to change the beneficiary, but provided that no change should bind the company unless indorsed on the policy by the president or secretary, refused to surrender possession of the policy which had been delivered to her for safe keeping, whereupon insured filed with the company a notice attempting to change the beneficiary, and the company made no objection to the change, but, on the contrary, waived the provision as to indorsement by filing a bill of interpleader after insured's death, the change was effected, and the substituted beneficiaries were entitled to the fund.

(For other cases, see Insurance, Cent. Dig. § 1469; Dec. Dig. § 587.)

5. INSURANCE—RIGHTS OF BENEFICIARY—PAYMENT OF PREMIUM.

Where a policy authorized insured to change the beneficiary from time to time, the payment of premiums thereon by the beneficiary did not affect her rights.

(For other cases, see Insurance, Cent. Dig. § 1469; Dec. Dig. § 587.)

Appeal from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Bill of interpleader by the John Hancock Mutual Life Insurance Company against Mary A. Bedford and others. From a decree in favor of the other respondents, respondent Lottie A. Bedford appeals. Affirmed and remanded.

Leonard W. Horton and W. Louis Frost, both of Providence, for Appellant.

Doran & Flanagan, of Providence, for Appellee John Hancock Mut. Life Ins. Co.

Joseph H. Coen, of Providence, for other Appellees.

McMANUS vs. PRUDENTIAL INS. CO. OF AMERICA.*

(Supreme Court of South Carolina.)

1. INSURANCE—ACTIONS—NONSUIT.

In an action upon a life policy, defendant is not entitled to a nonsuit at the close of plaintiff's evidence on the ground that plaintiff failed to show a compliance by insured with the provisions requiring premiums to be paid by a stipulated time, for the plaintiff might show waiver by the insurer.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

2. INSURANCE—ACTIONS—EVIDENCE—SUFFICIENCY.

In a suit on a life policy, evidence of waiver by the insurer of a strict compliance with the provisions of the policy requiring premiums to be paid by a stipulated time held sufficient to go to the jury.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

Appeal from Common Pleas Circuit Court of Richland County; Frank B. Gary, Judge.

Action by Nora Ellen McManus against the Prudential Insurance Company of America. From a judgment for plaintiff, defendant appeals. Affirmed.

of Mordecai, Gadsden & Rutledge, of Charleston, and Robt. Moorman, Columbia, for Appellant.

*Decision rendered, Jan. 13, 1914. 80 S. E. Rep. 613.



EDMONDS vs. MUTUAL LIFE INS. CO. OF NEW YORK.*

(Supreme Court of South Dakota.)

INSURANCE—LIFE INSURANCE—CONDITION.

Where the application for a life policy provided that during the period of one year following the date of issue of the policy the insured should not engage in certain extra hazardous occupations, and the policy provided that it was free from any restriction after one year from its date of issue, the fact that insured, before the expiration of one year, engaged in a prohibited occupation will not wholly avoid the policy, but will merely suspend it until the expiration of the stipulated time, and upon death after the expiration of that time recovery may be had, where the breach of the condition did not appear to have caused death.

(For other cases, see Insurance, Cent. Dig. § 879; Dec. Dig. § 339.)

*Decision rendered, Dec. 30, 1913. 144 N. W. Rep. 718.

Appeal from Circuit Court, Minnehaha County; Joseph W. Jones, Judge.

Action by Charles H. Edmonds against the Mutual Life Insurance Company of New York. From a judgment overruling a demurrer to the complaint, defendant appeals. Affirmed.

Bailey & Voorhees, of Sioux Falls, and Frederick L. Allen, of New York City, for Appellant.

Charles P. Bates, of Sioux Falls, and E. H. Wilson, of Salem, for Respondent.

AMERICAN NAT. INS. CO. *vs.* FAWCETT.*

(Court of Civil Appeals of Texas. Dallas.)

1. INSURANCE—LIFE INSURANCE—BURDEN OF PROOF—STATE OF HEALTH.

The burden was not on one, suing on a life policy, to show that she was in sound health at the issuance of the policy, which provided that no obligations were assumed unless insured was in sound health, under Rev. Civ. St. 1911, arts. 4947, 4948, requiring misrepresentations by insured to be material to avoid the contract, and barring such defense unless defendant show at trial that it notified insured, after discovering the falsity of such representations, that it refused to be bound by the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.)

2. INSURANCE—LIFE INSURANCE—DEFENSES—ESTOPPEL TO ASSERT.

Where a life insurance company was informed about June, before insured's death in January, 1911, that she was in bad health when insured, and did not then cancel the policy, it was estopped from afterwards denying liability.

(For other cases, see Insurance, Cent. Dig. §§ 1037, 1038; Dec. Dig. § 390.)

Appeal from District Court, Dallas County; W. F. Whitehurst, Judge.

Action by W. A. Fawcett against the American National Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

M. L. Robertson and W. H. Clark, both of Dallas, for Appellant.
Ross & Muse, of Dallas, for Appellee.

* Decision rendered, Dec. 20, 1913. 162 S. W. Rep. 10.

**STATE DIVISION, LONE STAR INS. UNION *vs.* BLAS-
SENGAME.***

(Court of Civil Appeals of Texas. Ft. Worth.)

**1. INSURANCE—ACTION ON CERTIFICATE—SUFFICIENCY OF
EVIDENCE—NOTICE OF ASSESSMENT.**

Evidence, in an action upon a fraternal beneficiary certificate, where defendant set up a forfeiture for nonpayment of assessments, and where plaintiff alleged that no notices of the assessments were mailed, held to sustain a finding that notices of such assessments were not mailed at such time as to justify a forfeiture prior to the time those assessments were actually tendered, three days before the member's death.

(For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.)

2. EVIDENCE—PRESUMPTION—RECEIPT OF MATTER MAILED.
Notices of assessments, if mailed, would be presumed to have been received.

(For other cases, see Evidence, Cent. Dig. § 92; Dec. Dig. § 71.)

**3. INSURANCE—MUTUAL BENEFIT ASSOCIATIONS—NOTICE
OF ASSESSMENT—EVIDENCE.**

In an action on a fraternal beneficiary certificate, defended on the ground of forfeiture by failure to pay certain assessments, and in which plaintiff claimed that no notices thereof were received, evidence that other members of the association had received notices mailed at the time plaintiff's notice was alleged to have been mailed, and had paid their assessments promptly, was inadmissible, as tending to multiply the issues by inquiring into collateral matters.

(For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.)

**4. INSURANCE—FRATERNAL BENEFICIARY ASSOCIATION—
ACTION—INSTRUCTIONS.**

In an action on a benefit certificate, where there was no contention that the notices of assessments were or could have been mailed at any other time than that claimed by defendant, an instruction that the burden of proof was upon the defendant to show that notices were mailed at that time was not objectionable, on the ground that it was sufficient if the notices were mailed at such a time as to afford insured fifteen days prior to her death in which to pay the assessments.

(For other cases, see Insurance, Cent. Dig. § 2010; Dec. Dig. § 826.)

Appeal from District Court, Johnson County; O. L. Lockett, Judge.
Action by H. C. Blassengame against the State Division, Lone Star Insurance Union. Judgment for plaintiff, and defendant appeals. Affirmed.

Moore & Park, of Paris, and Walker & Baker, of Cleburne, for Appellant.

R. S. Phillips and H. P. Brown, both of Cleburne, for Appellee.

* Decision rendered, Nov. 22, 1913. 162 S. W. Rep. 6.

**NATIONAL COUNCIL OF THE KNIGHTS AND LADIES
OF SECURITY vs. SEALEY.***

(Court of Civil Appeals of Texas. Texarkana.)

1. INSURANCE—LIFE INSURANCE—MISREPRESENTATION.

Where an applicant for membership in a fraternal insurance order denied ever having inflammatory or acute rheumatism, and it appeared that some time previous to his death he had been afflicted with lumbago, or rheumatism of his back muscles, his answer could not be held as a matter of law a misrepresentation under the laws of the order providing that misrepresentations should defeat any recovery.

(For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.)

2. INSURANCE — FRATERNAL INSURANCE — ACTIONS — EVIDENCE.

In an action on an insurance certificate issued by a fraternal order, evidence that, at the time of the application, insured made a full statement to the medical examiner of the order as to his previous affliction with muscular rheumatism, is admissible to show that he did not make any misrepresentation when he denied ever having had acute or inflammatory rheumatism.

(For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.)

3. APPEAL AND ERROR—DETERMINATION—REVERSAL.

In an action on a fraternal insurance policy, amounting to \$1,000 where it expressly provided that the insurer might retain \$50 out of each \$1,000 for the purpose of constituting a special fund, a judgment which provided for recovery of the full amount of the policy need not be reversed, but will be reformed on appeal so as to allow the reduction.

(For other cases, see Appeal and Error, Cent. Dig. § 4498-4506; Dec. Dig. § 1151.)

On Motion for Rehearing.

4. INSURANCE—FRATERNAL INSURANCE—MISREPRESENTATION.

Under Rev. Civ. St. 1911, art. 4834, providing that all benefit certificates shall be noncontestable on account of any representation made by the applicant, unless such representation shall be material to the risk assumed, a denial that the applicant had been treated by a physician for any constitutional disease or injury within five years cannot be held as a matter of law a representation material to the risk assumed, where it appeared that he had only been given electric treatments for a stiff back.

(For other cases, see Insurance, Cent. Dig. §§ 1859-1865; Dec. Dig. § 723.)

Appeal from District Court, Hunt County; R. L. Porter, Judge.

Action by Jennie V. Sealey against the National Council of the Knights and Ladies of Security. From a judgment for plaintiff, defendant appeals. Affirmed.

Crosby, Hamilton & Harrell, of Greenville, for Appellant.
Evans & Carpenter, of Greenville, for Appellee.

* Decision rendered, Dec. 26, 1913. On Motion for Rehearing Jan. 8, 1914. 162 S. W. Rep. 455.

**MUTUAL LIFE INS. CO. OF NEW YORK vs. BOARD,
ARMSTRONG & CO. CORPORATION.***

(Supreme Court of Appeals of Virginia.)

1. CORPORATIONS—ULTRA VIRES CONTRACTS.

Where the president, general manager, and principal incorporator of a corporation, to protect it and its creditors, procured a policy of insurance on his life for the benefit of the corporation which paid the premium, the contract of insurance was not an ultra vires on the part of the corporation.

(For other cases, see Corporations, Cent. Dig. §§ 1786, 1788, 1807; Dec. Dig. § 447.)

**2. INSURANCE --- "INSURABLE INTEREST" — CORPORATION'S
INTEREST IN OFFICER'S LIFE.**

A corporation had an insurable interest in the life of its president, general manager, and principal incorporator, whose relation to and knowledge of its financial and manufacturing interests was such that his death could not fail to result in serious and substantial loss to its creditors, and others interested in its prosperity, and hence, where a policy on his life for its benefit was a bona fide transaction, consummated with the honest purpose of protecting the corporation against loss in the event of his death, it was not obnoxious to public policy.

(For other cases, see Insurance, Cent. Dig. §§ 158-162; Dec. Dig. § 116.)

(For other definitions, see Words and Phrases, vol. 4, pp. 3670-3674; vol. 8, p. 7690.)

Error to Circuit Court of City of Alexandria.

Action by the Board, Armstrong & Co. Corporation against the Mutual Life Insurance Company of New York. Judgment for plaintiff, and defendant brings error. Affirmed.

John M. Johnson, of Alexandria, for Plaintiff in Error.

S. G. Brent, of Alexandria, Chas. E. Plummer, of Petersburg, and C. E. Nicol and Gardner L. Boothe, both of Alexandria, for Defendant in Error.

*Decision rendered, Jan. 15, 1914. 80 S. E. Rep. 565.



**MUTUAL LIFE INS. CO. OF NEW YORK vs. BOARD
MOTOR TRUCK CO. CORPORATION.***

(Supreme Court of Appeals of Virginia.)

Error to Circuit Court of City of Alexandria.

Action by the Board Motor Truck Company Corporation against the

* Decision rendered, Jan. 15, 1914. 80 S. E. Rep. 567.

Mutual Life Insurance Company of New York. Judgment for plaintiff, and defendant brings error. Affirmed.

John M. Johnson, of Alexandria, for Plaintiff in Error.
S. G. Brent, of Alexandria, Chas. E. Plummer of Petersburg, and C. E. Nicol and Gardner L. Boothe, both of Alexandria, for Defendant in Error.

FUGINA *vs.* NORTHWESTERN NAT. LIFE INS. CO.*

(Supreme Court of Wisconsin.)

1. INSURANCE — LIFE INSURANCE — ACTIONS — EVIDENCE —SUFFICIENCY.

In an action on a life policy, evidence held sufficient to warrant the finding that the insurer had waived the provisions of the policy as to lapse for nonpayment of premiums at the time fixed.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

2. INSURANCE—LIFE INSURANCE—WAIVER OF CONDITION.

Where an insurance policy provided for a forfeiture in case of nonpayment of premiums at the time fixed, but the insurer, by a long course of dealing, induced the insured to believe that strict compliance would not be insisted on, the insurer cannot declare a forfeiture because the insured did not pay the premiums when due; that provision of the policy having been waived.

(For other cases, see Insurance, Cent. Dig. §§ 1026, 1027, 1030, 1035, 1040, 1057; Dec. Dig. § 388.)

Appeal from Circuit Court, Trempealeau County; E. C. Higbee, Judge.

Action by Mary Fugina against the Northwestern National Life Insurance Company.

From a judgment for defendant, plaintiff appeals. Affirmed.

George H. Gordon, of La Crosse, for Appellant.

Richmond & Richmond and Frank C. Richmond, all of Arcadia, and Frank Winter, of La Crosse, for Respondent.

* Decision rendered, Jan. 13, 1914. 144 N. W. Rep. 989.

NORTHWESTERN MUT. LIFE INS. CO. vs. ADAMS ET AL.*

(Supreme Court of Wisconsin.)

1. INSURANCE—EXECUTION OF CONTRACT.

A life policy executed at Milwaukee and payable there by its terms, which also provided that it was made and to be performed in Wisconsin, was a Wisconsin contract, though both insured and the beneficiary resided in another state.

(For other cases, see Insurance, Cent. Dig. §§ 173-175; Dec. Dig. § 125.)

2. DOMICILE—SUFFICIENCY OF EVIDENCE.

Evidence, in an action involving the proceeds of a life policy, held to show that insured was not a resident of Minnesota or domiciled therein when he died, but was merely there temporarily.

(For other cases, see Domicile, Cent. Dig. § 39; Dec. Dig. § 10.)

3. HUSBAND AND WIFE—STATUTORY REGULATIONS.

Marriage is a status, and the parties thereto are subject to the regulations and disabilities imposed upon them in that capacity by the laws of the state of their domicile.

(For other cases, see Husband and Wife, Cent. Dig. §§ 3, 4, 11; Dec. Dig. § 2.)

4. INSURANCE—LIFE INSURANCE—ASSIGNMENT OF POLICY.

An assignment of a chose in action, such as an insurance policy may be required to be according to the requirements of the state where the assignment is made, though the contract be executed in another state.

(For other cases, see Insurance, Cent. Dig. § 469; Dec. Dig. § 200.)

5. CONTRACTS—VALIDITY.

A contract valid where made will be held valid in another jurisdiction, unless contrary to good morals or the public policy of such other jurisdiction.

(For other cases, see Contracts, Cent. Dig. §§ 2, 41, 145; Dec. Dig. § 2.)

6. INSURANCE—ASSIGNMENT OF POLICY—WHAT LAW GOVERNS.

Though under the laws of Minnesota an insured who had taken out a policy in his wife's favor could not afterwards assign the policy to another because he had no interest therein, if the policy was a Wisconsin contract, in which state such assignment would be valid, the fact that insured assigned it while temporarily a resident of Minnesota would not prevent the assignment from being valid and enforceable in Wisconsin; the Minnesota laws not making such an assignment unlawful.

(For other cases, see Insurance, Cent. Dig. § 469; Dec. Dig. § 200.)

7. ASSIGNMENTS—CONFLICT OF LAWS.

An assignment of a chose in action which passes good title under the *lex situs* of the debt is valid; but the debtor's liabilities are to be determined by the law governing the contract between him and the creditor, and matters of procedure in an action to recover the debt are governed by the law of the forum.

(For other cases, see Assignments, Cent. Dig. § 4; Dec. Dig. § 2.)

* Decision rendered, Jan. 13, 1914. 144 N. W. Rep. 1108.

Appeal from Circuit Court, Milwaukee County; J. C. Ludwig, Judge.
Interpleader by the Northwestern Mutual Life Insurance Company against William E. Adams and Ida M. Lincoln. From a judgment awarding a fund to Ida M. Lincoln, defendant Adams appeals. Reversed and remanded, with directions to enter judgment for appellant.

Bloodgood, Kemper & Bloodgood, of Milwaukee (Jackson B. Kemper, of Milwaukee, of counsel), for Appellant.

George H. Katz, of Milwaukee, and McClellan, Hensel & Guthrie, of Muncie, Ind., for Respondent.

FIRE, TORNADO, ETC.

SUPREME COURT OF NEW YORK.
APPELLATE DIVISION, THIRD DEPARTMENT.

J. E. DAVIS MFG. CO.

vs.

STUYVESANT INS. CO. ET AL.*

1. INSURANCE—PRESUMPTIONS—CORRECTNESS OF AWARD.
It is presumed that an award of appraisers as to the value of insured property destroyed was just and proper.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.)

2. INSURANCE—FIRE INSURANCE—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action on a fire policy, *held* to sustain a finding that the purported appraisal of the value of the property was not made fairly and justly, after deliberation and consideration by the appraisers.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

3. INSURANCE — FIRE INSURANCE — ACTIONS — SUFFICIENCY OF EVIDENCE.

Evidence, in an action on a fire policy, *held* to sustain a finding that insured's sprinkling apparatus was maintained as it existed at the time the policy was taken out.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

4. APPEAL AND ERROR—PRESUMPTIONS—COMMISSION OF CRIME.

Courts will not presume, upon doubtful evidence in a civil case, that a person deliberately committed perjury.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.)

Appeal from Trial Term, Cortland County.

Action by the J. E. Davis Manufacturing Company against the Stuyvesant Insurance Company and others. From a judgment for plaintiff and an order denying a new trial, defendant named appeals. Affirmed.

Argued before Smith, P. J., and Kellogg, Lyon, Howard, and Woodward, JJ.

White, Cheney, Shinaman & O'Neill, of Syracuse (J. L. Cheney, of Syracuse, of counsel), for Appellant.

Davis & Lusk, of Cortland (Clayton R. Lusk, of Cortland, of counsel), for Respondent.

* Decision rendered, Jan. 7, 1914. 145 N. Y. Supp. 192.

WOODWARD, J.

This action was brought on the 18th day of October, 1912, to recover on a policy of insurance issued by the defendant insurance company; the complaint demanding judgment in the sum of \$2,493.22 by reason of the destruction of the plant of the plaintiff, located in the city of Cortland, by a fire on the 5th day of April, 1912. The policy in question was one of a group of policies aggregating \$215,750 written by various insurance companies upon the property of the plaintiff, and the particular policy was for the sum of \$2,500. The answer admits the writing and delivery of the policy and the fact of the fire, but sets up as an affirmative defense that the fire was caused by the fraudulent acts of the plaintiff; that the policy contained a sprinkler guaranty clause which was violated at the time of the fire; that there was fraud and misrepresentation on the part of the plaintiff in making up the proofs of loss, and the proceedings following it; and for a partial defense that there was an appraisal and an award, fixing the total loss at \$152,625.05, and that the share of the defendant, in case of a recovery, would amount to only \$1,768.53. The plaintiff replied to the affirmative defense of appraisal and award, setting up that the same was irregular, improper, and secured by fraud and misrepresentation on the part of the defendant insurance company.

The issues thus presented were tried before a jury, the trial lasting about three weeks, producing a voluminous record, dealing with the facts involved in determining the value of the property destroyed, and resulted in a verdict for the full amount claimed by the plaintiff. A motion for a new trial, upon the usual grounds, was made and denied, and the defendant appeals to this court.

The plant which was destroyed was engaged in the manufacture of piano cases and piano backs, and there was nothing saved with the exception of the boiler house and a small portion of the office equipment and other matters of trifling value, and there was, of course, difficulty in producing high character of evidence of the quantity and value of the materials on hand, which were in various stages of development in the process of manufacture. There is practically no controversy over the valuation of the buildings, or of the machinery; but upon the question of the values to be placed upon the materials, and the quantity thereof, there is a bitter controversy, and upon these depend largely the merits of the case. We are of the opinion, however, that the evidence presented a question for the jury, and that the verdict rests upon a substantial foundation. It is obviously impossible to know exactly the amount of material, and its exact condition of development toward the completed product, where the factory is actively at work, and especially so when the work is interrupted by a fire which utterly consumes all of the materials.

To meet this situation, the plaintiff took the original slips containing statements made for the purposes of the annual inventory in January, 1912, and then added to these the amount of purchases since made, deducting the amount of materials involved in the deliveries which had been made down to the time of the fire, and in this manner reached an approximation of the amount of materials destroyed. While this must, of necessity, leave the matter open to a good deal of speculation, a careful analysis of the evidence of all of the parties to the controversy indicates that it has resulted in a verdict which is not far from just and equitable, and the contract of insurance certainly does not contemplate that the insured shall be called upon to suffer the loss which the insurer has agreed to liquidate, simply because the fire has destroyed the possibility of a perfectly accurate proof of each particular item of damage.

The defendant urges as its first point that there was no evidence in the case which would justify the submission to the jury of the question of the validity of the award made by the appraisers appointed under the provisions of the standard policy.

[1] There can be no doubt that the presumption is with the defendant that the award was just and proper; but we are of the opinion that the evidence discloses a state of facts which made it proper to submit the question involved to the jury. The policy requires that, in the event of a disagreement as to the amount of loss, the "same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss," etc. The evidence discloses that the defendant employed one Thomas Fleming, of Cleveland, Ohio, who appears to have been an expert appraiser, who had been engaged in like work for a period of more than forty years, and who commanded a salary of \$50 per day and his expenses, and the testimony of this witness shows that he practically had no consultation with the appraiser named by the plaintiff as to any of the details of the appraisal. Indeed, it is impossible to read the record and find in it any attempt on the part of the defendant's appraiser to comply with the provisions of the policy, which requires that "the appraisers together shall then estimate and appraise the loss." He seems to have assumed that it was rather beneath his dignity to consult with the young man, a practical manufacturer, selected by the plaintiff, and the evidence fails to disclose a single occasion on which there was anything approximating a discussion of the merits involved and a fair effort to get together upon an appraisal. For instance, this witness tells us on his examination

that he refused to take any account of the estimate of depreciation upon the machinery made by the representative of an appraisal company who had personally examined the machinery with a view to making up his estimate of the value of the plant in the year before the fire, declaring that he thought he could get a better estimate of the value by arbitrarily discounting the value 50 per cent, and his whole attitude was that of one who assumed to know all about the facts without taking the trouble to look into them, while the appraiser appointed in behalf of the plaintiff appears to have stood around and made up a few figures on his own account, which were wholly ignored in the final determination made by the defendant's appraiser and the umpire.

[2] Without going to the extent of suggesting that the evidence warrants a holding that there was trickery used in the selection of the umpire, or that the latter acted in bad faith, we are fully persuaded that the evidence does disclose that there was never any such effort at a fair and impartial appraisal as the standard policy contemplates, and that the jury was fully justified in holding that the plaintiff was not bound by the alleged appraisal and award. The discussion of the conduct of the appraiser in the case of Bradshaw vs. Agricultural Ins. Co., 137 N. Y. 137, 143, 32 N. E. 1055, is so applicable to the present situation that it does not seem necessary to repeat the language here, and we conclude that in so far as the first point is concerned the judgment should not be disturbed.

[3] Under the second point it is urged that the insurance was void because of the violation by the plaintiff of the sprinkler warranty clause in the policy. We will assume, without discussion, though without committing ourselves to the proposition, that the plaintiff warranted that it would keep the sprinkling apparatus as it existed at the time of the writing of the insurance in the manner outlined by the policy. That is, the policy provided that the insurance was written upon the basis of the existing sprinkler system, and the insured agreed that:

"In so far as the sprinkler system and water supply therefor are under control of the assured, due diligence shall be used by the assured to maintain them in complete working order, and that no change will be made in the said system of water supply therefor without the consent of this company in writing."

There is no contention that there was any change in the system. There is some evidence that the supply was turned off at the time of the fire, both in its connection with the city water supply and the auxiliary tank, or that the tank was not supplied with water; but the evidence is by no means conclusive upon this point. There is evidence which is just as consistent with a different conclusion; there is affirmative and undisputed evidence that a gong designed to give warning when the sprinkler system was in operation was ringing for some time after the

firemen reached the plaintiff's plant, while there is testimony of a policeman that an employee of the plaintiff turned off the water from the city connection after the fire was under way, explaining that he did so to give a higher pressure upon the mains which were being called upon to supply the hose in fighting the fire. There were some suspicious facts connected with the fire; but there was no such weight of evidence in support of the defendant's theory as to warrant a reversal of the determination made by the jury, even assuming that the burden of proof was upon the plaintiff to show that it had used due diligence in preserving the sprinkler system.

[4] We are equally persuaded that the evidence did not require the jury to find that the plaintiff had been guilty of false swearing in reference to the proof of claim, or other matters, connected with the controversy. It is true that the president of the plaintiff company put a valuation upon some of the materials which seemed high in comparison to some other figures, but a careful analysis of the testimony shows conclusively that that witness was not testifying in reference to the same quality of goods, in the same stage of manufacture, which were involved in the figures which are used in comparison, and courts will not presume upon any doubtful basis that any one has deliberately committed perjury. The evidence shows that the materials as we have already pointed out, were in various stages of development in the manufacture of piano backs, etc., and the value of the lumber involved in their production would depend very largely upon the amount of labor, the waste, etc., which had been added or taken away. It is conceded, of course, that the witness made some mistakes; he admits these when called to his attention, but taking the testimony as a whole, and giving it its proper relation to the circumstances with which he was dealing, and we are not convinced that there was any intention on the part of the plaintiff to defraud the defendant in any of the matters alleged, and the jury appears to have taken this view of the evidence.

We do not think the evidence warranted the conclusion that the fire was due to any fraudulent act on the part of the plaintiff or its employees, or that the verdict in favor of the plaintiff is against the weight of evidence, or that there is any good reason for disturbing the judgment.

The judgment and order appealed from should be affirmed, with costs. All concur.

SUPREME COURT OF NEW YORK.
APPELLATE DIVISION, FOURTH DEPARTMENT.

O'NEIL

vs.

FRANKLIN FIRE INS. CO. OF PHILADELPHIA ET AL.*

1. APPEAL AND ERROR — PRESENTATION OF ERROR — MOTIONS—JUDGMENT—PREMATURE ENTRY.

Where a judgment is prematurely entered in favor of plaintiff, before the issues as between two defendants are disposed of, the remedy is by motion at special term to set aside the judgment as premature; such error not being ground for reversal on appeal.

(For other cases, see Appeal and Error, Cent. Dig. §§ 1343, 1345, 1382, 1386-1395, 1397, 1399-1401, 1404-1407; Dec. Dig. § 238.)

2. INSURANCE—FIRE POLICY—LOSS PAYABLE TO MORTGAGEE—PARTIES—JOINER.

Where a policy provided that any loss was payable to a mortgagee as his interest might appear, he was a necessary party to a suit on such policy, and was authorized by Code Civ. Proc. § 521, to assert his claim against defendant insurance company by answer.

(For other cases, see Insurance, Cent. Dig. §§ 1557-1570; Dec. Dig. § 624.)

3. ACTION—SINGLE CONTRACT—SEPARATE ACTIONS.

Separate actions cannot be maintained by an insured and a mortgagee, to whom any loss was payable as his interest might appear, to recover separately the amounts payable to each thereunder.

(For other cases, see Action, Cent. Dig. §§ 511-547; Dec. Dig. § 50.)

4. LIMITATION OF ACTIONS—CONTRACT LIMITATIONS—EFFECT—STATUTES.

Periods of limitation fixed by special contract are periods of limitation prescribed by the chapter containing Code Civ. Proc. § 415, providing that the periods of limitation prescribed by the chapter except as otherwise specially prescribed therein, must be computed from the time of the accruing of the right to relief to the time when the claim to that relief is actually interposed by the party as plaintiff, or defendant, in the particular action or special proceeding.

(For other cases, see Limitation of Actions, Cent. Dig. §§ 240-253; Dec. Dig. 46.)

5. LIMITATION OF ACTIONS—FIRE POLICY—ACTIONS—LIMITATIONS—CLAIM OF MORTGAGEE—"VOLUNTARY DISCONTINUANCE."

Code Civ. Proc. § 405, provides that if an action is commenced within the time limited, and terminated, except by voluntary discontinuance, etc., plaintiff may commence a new action for the same cause after expiration of the time so limited, and within one year after the reversal or termination. A mortgagee, to whom a fire policy was payable as his interest might appear, commenced a separate action on the policy

* Decision rendered, Nov. 26, 1913. 145 N. Y. Supp. 432.

before the expiration of the twelve-month limitation contained in the policy, but, insured having also brought suit against the insurer, it was stipulated that the mortgagee's action should be dismissed, and that his claim should be asserted in the insured's action by answer, which was served after the twelve-month period had expired, whereupon the mortgagee's action was dismissed. *Held*, that such dismissal by virtue of the stipulation between the parties was not a "voluntary discontinuance" within section 405, and that the mortgagee's claim was therefore not barred by limitations.

(For other cases, see Limitation of Actions, Cent. Dig. §§ 539, 545, 553-556; Dec. Dig. § 130.)

(For other definitions, see Words and Phrases, vol. 8, p. 7346.)

6. INSURANCE—A C T I O N S—MORTGAGEE'S CLAIM—LIMI-TA-TIONS—EFFECT.

Lines 56 to 59 of a New York standard fire insurance policy provide that, if with the insurer's consent an interest under the policy shall exist in favor of a mortgagee, or of any person having an interest in the property, other than the interest of the insured as described, the conditions "hereinbefore" contained shall apply in the manner expressed in such provisions and conditions of insurance, relating to such interest as shall be written upon, attached to, or appended to, the policy. *Held*, that the policy clause, providing that any suit thereon must be brought within twelve months as found in lines 106 and 109, was not applicable to the claim of the mortgagee.

(For other cases, see Insurance, Cent. Dig. §§ 1540, 1544-1550; Dec. Dig. § 622.)

7. INSURANCE—FIRE POLICY—INTEREST OF INSURED—CON-TRACT OF SALE.

A contract for the sale of a farm and insured buildings thereon, on which the purchaser had paid a small portion of the price prior to a fire destroying the dwelling house, and who after the fire completed the purchase by paying the remainder of the price and receiving a deed, did not avoid the policy.

(For other cases, see Insurance, Cent. Dig. §§ 794-822, 825; Dec. Dig. § 328.)

8. INSURANCE—FIRE POLICY—MORTGAGEE'S INTEREST—OF-FER TO PAY—SUBROGATION.

A fire policy provided that whenever the insurer should pay the mort-gagee any sum for loss or damage thereunder, and should claim that as to the mortgagor no liability existed, the insurer to the extent of such payment should be subrogated to all rights of the party to whom payment was made under all securities held as collateral to the mort-gage debt, or at its option might pay to the mortgagee the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment of the mortgage. *Held*, that such clause did not vest in the insurer a right to subrogation on a mere assertion of an unfounded claim that it was not liable to the mortgagor and hence, on tender of the mortgage debt it was not entitled to subrogation, nor to an assignment of the mortgage, where it only failed to prove its nonliability to the mortgagor, but suf-fered judgment in his favor.

(For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.)

Kruse, P. J., dissenting.

Appeal from Trial Term, Herkimer County.

Action by Mollie E. O'Neil against the Franklin Fire Insurance Company of Philadelphia and Daniel Crimmins. From a judgment in favor of defendant Crimmins, on an answer in the nature of a cross-complaint, defendant insurance company appeals. Affirmed.

Argued before Kruse, P. J., and Robson, Foote, Lambert, and Merrell, JJ.

William Townsend, of Utica, for Appellant.
P. H. Fitzgerald, of Utica, for Respondent.

Defendant Crimmins has recovered a judgment against defendant Franklin Fire Insurance Company for \$1,000 and \$90.80 interest, and \$79.00 costs, upon a fire insurance policy issued by defendant insurance company May 17, 1909 to plaintiff, Mollie E. O'Neil, covering the dwelling house upon a farm owned by said Mollie E. O'Neil, to the amount of \$1,000, and the furniture, etc., therein to the amount of \$400. The loss, if any, upon the buildings was made payable to defendant Daniel Crimmins, mortgagee, as his interest might appear, by a New York standard mortgagee clause attached to said policy, said Crimmins then holding a mortgage on said farm on which there was unpaid about \$1,600. The premium was paid by plaintiff. The policy was for a term of three years. On March 23, 1911, a fire occurred by which the dwelling house and contents were destroyed. Some time before the fire plaintiff entered into a contract with one Miller to sell this farm to him. Miller paid \$200 of the purchase price, and was, by the terms of the contract, to pay the balance and receive his deed on April 1, 1911, and notwithstanding the fire on March 23d, Miller did, on or about April 1st, complete the purchase by paying the remainder of the purchase price and receiving his deed. Plaintiff, however, remained in possession and retained the title until that date. Plaintiff prepared and served upon the insurance company in due time proofs of loss.

On February 1, 1912, defendant Crimmins brought an action in this court against defendant insurance company to recover the \$1,000 payable to him as mortgagee upon the loss on the dwelling house. He did not make plaintiff a party to that action. On March 20, 1912, and within twelve months after the fire, this action was begun. In her complaint plaintiff alleged the making of the insurance policy; the standard mortgagee clause thereto attached, making the loss payable to defendant Crimmins, mortgagee, as his interest should appear; the occurrence of the fire and making of proofs of loss; the bringing of an action by Crimmins against the insurance company to recover the \$1,000 loss on the dwelling house payable to him, without making plaintiff a party; and demanded judgment for \$400, the loss on the furniture and contents of the dwelling, which was not payable to the mortgagee. In October, 1912, the Crimmins action was brought

to trial, and, as appears from the findings of the justice who presided at the trial in the present case, upon the question being raised by defendant insurance company that the present plaintiff was a necessary party to that action, and upon the suggestion of the court that Crimmins might serve a cross-answer in this action, setting up his claim against the insurance company, and upon the express or implied agreement of the insurance company to receive such answer, the Crimmins action was discontinued without costs. These facts, however, do not appear in the record on this appeal, except in the findings and opinion of the court. Thereupon defendant Crimmins prepared and served his answer in this case upon plaintiff and upon defendant insurance company, his right to do so not having expired by limitation of time as to defendant insurance company (Code Civ. Proc. § 521), and plaintiff being willing to accept the same, although as to her the time had expired. By this answer defendant Crimmins sought to recover from defendant insurance company the \$1,000 payable to him as mortgagee. Crimmins' action was not, in fact, formally discontinued by stipulation and order until some days after this answer had been served, and on October 30, 1912. The answer of defendant Crimmins was served on October 17, 1912. Prior thereto, and on October 7, 1912, one Staley, special agent and adjuster for defendant insurance company, on its behalf, tendered to defendant Crimmins the full amount remaining unpaid upon his mortgage, and at the same time served upon him a written notice, signed in the name of the insurance company by said Staley as special agent, stating, among other things, that the insurance company claimed that as to the mortgagor and owner, Mollie E. O'Neil, no liability under said policy existed, and that said company accordingly elected to and exercised its option, pursuant to the terms of the mortgagee clause, to pay to Crimmins, the mortgagee, the whole amount due and to grow due on the mortgage, and all interest thereupon, and to receive a full assignment and transfer of the mortgage. Said notice also stated that the tender would be kept good by depositing and leaving the same with the said Staley to be paid to said Crimmins at any time upon his executing and delivering to said Staley an assignment of the said mortgage to the said insurance company. This tender Crimmins refused to accept. The tender was made in legal tender currency, which Staley kept and, at the time of the trial, he testified that he still had the same in his possession in a safe deposit vault in the United National Bank in Utica. It was not, however, paid into court, nor did Staley present to Crimmins a prepared assignment of the mortgage to be executed.

This action, as between the defendants, was brought to trial on December 11, 1912, plaintiff not appearing. A few days before and on November 26th, defendant insurance company served

upon plaintiff's attorney an offer to permit plaintiff to take judgment against it in the sum of \$200. On December 5th plaintiff accepted this offer, and on December 12th, judgment was entered in Herkimer County Clerk's office in favor of plaintiff against defendant insurance company for \$200 and costs upon filing the offer and acceptance.

By motion at the opening of the trial and at the close of plaintiff's evidence and at the close of the whole case, counsel for defendant insurance company moved to dismiss the claim of Crimmins as asserted in his answer, upon the several grounds now urged in support of this appeal, and counsel for defendant Crimmins moved for the direction of a verdict in his favor, whereupon the jury were discharged and the court made findings of fact and conclusions of law, and therein directed judgment in favor of defendant Crimmins against defendant insurance company for the \$1,000 claimed, with interest and costs. From the judgment entered upon this decision, defendant insurance company appeals.

FOOTE, J.

[1] If there was an irregularity in the entry of the judgment in plaintiff's favor before the issues as between the two defendants were disposed of, we think the remedy of the appellant was to move at special term to set aside plaintiff's judgment as prematurely entered, and that is not a ground for reversal of the judgment appealed from.

[2] We are also of opinion that defendant Crimmins was a necessary party to this action and that it was proper practice for him to assert his claim under the policy in suit against defendant insurance company by his answer in this action, and that such practice is authorized by section 521 of the Code.

[3] Separate actions could not have been maintained by plaintiff and defendant Crimmins to recover separately the amounts payable to each under this policy. *Lewis vs. Guardian Fire & Life Assur. Co.*, 181 N. Y. 392, 74 N. E. 224, 106 Am. St. Rep. 557.

Appellant next urges that the short statute of limitations of twelve months contained in the policy is a bar to the right of defendant Crimmins to recover. This claim is based upon the fact that Crimmins' claim was first asserted in this action by his answer which was made and served upon the insurance company on October 17, 1912, while the fire occurred on March 23, 1911. The policy is the New York standard form of policy, and contained this clause:—

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

It was held at the trial that the limitation contained in the policy did not bar Crimmins' claim asserted in his answer, inasmuch as this action was begun by the service of the summons within the year, and in the opinion of the learned trial justice it was further said that the circumstances under which the action brought by Crimmins was discontinued and his answer in this action, accepted by defendant insurance company, constituted a waiver of the contractual limitation contained in the policy. It is now urged that the contractual limitation is, in legal effect, a statutory limitation, inasmuch as the form of the policy is fixed by statute, and that section 415 of the Code is controlling, which provides:—

"The periods of limitation, prescribed by this chapter, except as otherwise specially prescribed therein, must be computed from the time of the accruing of the right to relief by action, special proceeding, defense, or otherwise, as the case requires, to the time when the claim to that relief is actually interposed by the party, as a plaintiff or a defendant, in the particular action or special proceeding."

[4] Periods of limitation fixed by special contract are held to be periods of limitation prescribed by this chapter, as that expression is used in the above-quoted section. *Hayden vs. Pierce*, 144 N. Y. 512, 39 N. E. 638; *Hamilton vs. Royal Ins. Co.*, 156 N. Y. 327, 50 N. E. 863, 42 L. R. A. 485.

[5] If the claim interposed as a defense referred to in the above-quoted section 415 is not limited to defenses tending to defeat plaintiff's claim, but apply to affirmative defenses in the nature of independent causes of action against a codefendant (as to which we need not here express an opinion), still we think the right of defendant Crimmins is not barred by the twelve month period of limitation, because of the provisions of section 405 of the Code, as follows:—

"If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if he dies, and the cause of action survives, his representative, may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such a reversal or termination."

The burden here was upon the insurance company to establish that the claim of defendant Crimmins was barred by limitation. He had brought an action upon this claim before the twelve months expired. That action was terminated under circumstances not amounting to a voluntary discontinuance, so far as appears in this record. The court was about to hold that the action could not be maintained because of defect of parties defendant, where-

upon the court suggested that the Crimmins claim could be litigated in the present action, and that he should present it here by serving an answer. The action was discontinued by virtue of a stipulation signed by counsel for the respective parties. We think this was not a voluntary discontinuance within the intent and meaning of this section, and that the limitation of the policy is not a bar to a new action by Crimmins, or to asserting the same by answer served upon the insurance company. *Bannister vs. Michigan Mut. Life Ins. Co.*, 111 App. Div. 765, 97 N. Y. Supp. 843; *People ex rel. McCabe vs. Snedeker*, 106 App. Div. 89, 94 N. Y. Supp. 319, affirmed 182 N. Y. 403, 68 N. E. 662.

There is further reason why the twelve-month limitation is not available to defendant insurance company as a defense, assuming, as we do, that it was not necessary for the insurance company to plead this defense as between itself and its codefendant Crimmins.

[6] The clause in the policy which provides that suit upon the policy must be brought within twelve months is found in lines 106 to 109 of the standard form of policy. Lines 56 to 59 contain this clause:—

"If, with the consent of this company an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance, other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto."

This clause has recently received judicial construction, and it has been held that the clauses of the policy applicable as between the company and the mortgagee are only those clauses which precede lines 56 to 59, and that the clauses following from line 60, which have reference to proceedings after fire has occurred or for the adjustment of the loss and the payment or collection of insurance, are not applicable to the mortgagee. *Heilbrunn vs. German Alliance Ins. Co.*, 140 App. Div. 557, 125 N. Y. Supp. 374, affirmed 202 N. Y. 610, 95 N. E. 823.

A sentence from the opinion of Collin, J., in the Court of Appeals indicates the extent to which the decision goes in relieving the mortgagee from the limitation clause of the policy which the defendant insurance company relies upon here:—

"We admit that insurance companies ought to have more protection in the matter of the time within which actions upon their policies must be brought, and possibly in other respects than has been afforded them under the decision of the Appellate Division in this case; but the difficulty is that the language of those stipulations or conditions of the policy which relate to the proceedings after the liability of the company has accrued through the fire does not enable or permit us to apply them to the

mortgagee in such part only as may be practicable or expedient."

See, also, *McDowell vs. St. Paul Fire & Marine Ins. Co.*, 207 N. Y. 482, 101 N. E. 457, where the doctrine of the Heilbrunn Case is reaffirmed.

[7] It is next contended that the tender by the insurance company's agent to defendant Crimmins of the full amount of his mortgage and the demand for an assignment thereof precludes a recovery by Crimmins of the insurance money in this action. We are of opinion that such is not the case. The policy was issued directly to Mrs. O'Neil, plaintiff, by defendant's agent, and the premium was paid by her. It was a policy for \$3,200, \$1,000 upon the dwelling house which burned, and \$400 upon the furniture and contents. The rest was upon barns and contents which did not burn. It is clear that if defendant Crimmins' mortgage had been paid up before the fire, the whole insurance would have remained for the benefit of the owner. The insurance payable to Crimmins as mortgagee was not only for his benefit, but for the benefit of the owner who had the right to have such payment applied in reduction of the mortgage debt. Hence it would be unjust and not according to the intention of the parties that the insurance company should, upon payment to Crimmins, be subrogated to his position as holder of the mortgage, and thereby deprive the owner of the benefit of that part of the insurance money, unless the owner had in some way forfeited her right. The answer of the insurance company does not set up any breach of the contract of insurance upon the part of plaintiff, Mrs. O'Neil, or that her right under the policy has been in any way forfeited, nor does it allege that as to plaintiff no liability under the policy exists. The contract to sell the farm did not avoid the policy.

[8] But, assuming that notwithstanding the form of its answer, the insurance company may still assert and prove any defense which is available to it as against defendant Crimmins, we are of opinion that it was incumbent upon defendant insurance company to prove upon the trial that to the plaintiff, mortgagor and owner, no liability existed against it. The contract as contained in the mortgagee clause is:—

"Whenever this company shall pay the mortgagee any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability thereof existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option, pay to the mortgagee the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall

impair the right of the mortgagee to recover the full amount of his claim."

It is true that defendant insurance company did, by written notice served upon defendant Crimmins, claim that as to the mortgagor no liability existed against it, but it did not prove upon the trial that it was not liable to the mortgagor. On the contrary, before the trial, it made an offer of judgment to plaintiff, which plaintiff accepted, thus conceding a liability to plaintiff under the policy. This clause should not be construed to vest in the insurance company the right to subrogation upon the mere assertion of claim, unfounded in fact, and such was not the intent or purpose of the clause in question. The claim which it may assert must be a valid and well-founded claim, and so it has been held in construing mortgagee clauses identical with this. *Traders' Ins. Co. vs. Race*, 142 Ill. 338, 31 N. E. 392; *Anderson vs. Saugeen Mut. Fire Ins. Co.*, 18 Ont. Rep. 355; *Bull vs. North British Canadian Investment Co. & Imperial Fire Ins. Co.*, 15 Ont. Rep. 421, affirmed 18 Canada Supreme Court Reports, 697. In the last case it was held that the insurance company was not justified in paying the mortgagees and claiming subrogation without first contesting its liability to the mortgagor and establishing their indemnity from liability to him.

As the defendant insurance company failed to prove upon the trial that as to plaintiff no liability existed under the policy, it has failed to establish its right to subrogation in this action.

In *Heilbrunn vs. German Alliance Ins. Co.*, 150 App. Div. 670, 135 N. Y. Supp. 769, it appeared that as to the owner the policy had become null and void; hence what is said in the prevailing opinion as to the contract with the mortgagee being nothing more than a contract of indemnity is not applicable here.

The other questions urged upon this appeal were, we think, correctly disposed of, and do not call for special consideration here.

The judgment appealed from must be affirmed, with costs. All concur, except

KRUSE, P. J. (dissenting memorandum).

I think the insurance company was entitled to an assignment of the mortgage. As between the mortgagee and the insurance company, it was not necessary for the insurance company to show that it was not liable to the mortgagor and owner upon the policy. The insurance company made that claim and offered to pay the mortgagee the whole principal due or to grow due, with the interest, and demanded an assignment of the mortgage. Whether or not the insurance shall be applied as a payment upon the mortgage is a question between the mortgagor and the insurance company, in which the mortgagee has no interest. I think the mortgagee has no standing to contest that question with the insurance company.

The plaintiff, the owner, although originally a party to the action, dropped out of the case before the trial. She did not appear at the trial, but accepted the offer of judgment made by the insurance company, and a separate judgment was entered thereon. Furthermore, the action was not brought to recover the loss of property covered by the mortgage, but only for the personal property.

KANSAS CITY COURT OF APPEALS.

MISSOURI.

ALSOP PROCESS CO.

vs.

CONTINENTAL INS. CO.*

INSURANCE—COINSURANCE—STATUTORY PROHIBITIONS.

A provision of a fire insurance policy that the company, in case of loss, should be liable for only such portion thereof as the amount insured by the policy should bear to the actual cash value of the property covered by the policy, was void under Rev. St. 1909, § 7023, providing that no fire insurance policy shall contain any clause requiring the assured to take out a larger amount of insurance than that covered by the policy, nor providing that the assured shall be liable as coinsurer with the company issuing the policy for any part of the loss or damage which may be occasioned to the property covered thereby, or making provisions for a reduction of such loss by reason of the failure of the assured to take out and maintain other insurance, and that all such provisions shall be void, since such provision forced insured to share his loss with the insurer and carry a part of his own risk, and amounted to a coinsurance contract, though it was not framed in the words of the statute, and section 7030, providing that no company shall take a risk on any property at a ratio greater than three-fourths of the value of the property, and that, when taken, its value shall not be questioned in any proceeding, has no bearing on the construction of section 7023.

(For other cases, see Insurance, Cent. Dig. § 1277; Dec. Dig. § 501.)

Appeal from Circuit Court, Cooper County; John M. Williams, Judge.
Action by the Alsop Process Company against the Continental Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Barclay, Fauntleroy, Cullen & Orthwein, of St. Louis, for Appellant.
Williams & Williams, of Boonville, and Jeffries & Corum, of St. Louis, for Respondent.

* Decision rendered, Jan. 5, 1914. 162 S. W. Rep. 313.

ELLISON, P. J.

Plaintiff's action is based on a policy of fire insurance for \$1,250, and it obtained judgment in the trial court for the full amount. The policy contained a provision called a "Reduced Rate Agreement." It is as follows: "In consideration of the reduced rate of premium charged for this policy it is hereby mutually understood and agreed that this company shall in case of loss or damage, be liable for such portion only of the loss or damage as the amount insured by this policy shall bear to the actual cash value of the property covered by this policy at the time of the fire. Provided, however, that if the whole insurance shall be greater than the value of the property covered, this company shall not be liable for a greater portion of the loss or damage than the amount insured by this policy bears to the whole insurance covering the property at the time of the fire." The value of the property insured was \$21,703.50, and the total insurance, including policy in suit, was \$5,500. The total loss suffered at the fire was \$12,771.03, and defendant's position is that, under the terms of the foregoing provision, it is only liable for \$733.14 and that amount it tendered, and plaintiff refused, insisting that the full face of the policy was due.

Plaintiff conceded that if the foregoing provision is valid the tender made by defendant covers its liability. But plaintiff's position is that such provision is void as being in the face of section 7023, R. S. 1909, reading as follows: "No fire insurance policy which may be issued after this section takes effect shall contain any clause or provision requiring the assured to take out or maintain a larger amount of insurance than that covered by such policy, nor in any way providing that the assured shall be liable as co-insurer with the company issuing the policy for any part of the loss or damage which may be occasioned by fire or lightning to the property covered by such policy, nor making provisions for a reduction of such loss or damage, or any part thereof, by reason of the failure of the insured to take out and maintain other insurance upon said property. And all clauses and provisions in fire policies, issued after the taking effect of this section, in contravention of the prohibitions in this section contained, shall be ab initio void and of no effect." The effect of the provision in the policy is that, notwithstanding the insured's loss is *more* than the sum named as insurance, yet he can only claim a part of that sum. That is to say, by way of illustration, if the policy is for \$1,000, and the cash value of the property at time of fire is \$3,000, and the loss is \$2,100, since the policy is only one-third of the value, the insured can only claim one-third the amount of his loss, which in this case would be \$700, which is \$300 less than the amount called for in the policy. It thus seems clear that the insured is forced to share his loss with the insurer, notwithstanding it cuts down the amount of his policy. In other words, in his chances of a fire, he carries a *part* of his

own risk. Such provision is recognized as a coinsurance contract. We think this violates the statute. The statute reads that the policy shall not "in any way provide that the insured shall be liable as a co-insurer" for any part of the loss, yet it does in some way very effectually make such provision, for it compels him to bear a material part of his own loss. He must settle with the insurer just as he would had another company had concurrent insurance; that is to say, he must cut down the insurer's liability for a part of the loss. It is true the terms of the policy are not in the words of the statute. But the English language is so flexible that different words, framed in different ways, will mean the same thing, and therefore the enforcement of a civil statute is rarely left to the manipulation of words.

In Michigan (2 Comp. Laws, § 5183) insurance companies were forbidden to provide that their liability be restricted, by reason of the failure of the insured, to insure the property covered by the policy for any certain amount or proportion of the actual value of such property. A policy was issued with this stipulation: "In consideration of a reduced rate of premium, it is hereby agreed that in case of loss, this company will pay only such proportion of the loss as the sum hereby insured bears to 80 per cent of the value of the property insured, but in no case shall this company be liable for a greater proportion of any loss than the amount hereby insured bears to the whole insurance whether valid or not." This was held to be, in effect, a provision for coinsurance; and, though it did not set forth an agreement falling within the letter of the statute, yet the law should not be "evaded by mere phraseology." The views expressed in that case were approved in Dahms & Sons Co. vs. Ins. Co., 153 Iowa, 168, 132 N. W. 870, Ann. Cas. 1913D, 1301. A similar provision in a New York policy was recognized as coinsurance. Percentage coinsurance clause "means insurance by the company and the owner, depending upon the percentage or proportion which the insurance bears to the value." Farmers' Feed Co. vs. Ins. Co., 173 N. Y. 241, 247; 65 N. E. 1107.

We have not been able to see why section 7030 of the statute should influence the construction of section 7023 in favor of defendants. It provides that "* * * No company shall take a risk on any property in this state at a ratio greater than three-fourths of the value of the property insured, and when taken, its value shall not be questioned in any proceeding." The statute does not require that a policy shall be taken in a sum three-fourths of the value, nor does it mean that, if not taken in that proportion, the owner shall bear any part of the loss. Nor do we see that the case of Surface vs. Ins. Co., 157 Mo. App. 570, 139 S. W. 262, in any way aids defendant's theory of defense.

The judgment should be affirmed. All concur.

COURT OF APPEALS OF GEORGIA.**SOUTHERN STATES FIRE INS. CO.***vs.***TABOR ET AL. (No. 5,254.)*****INSURANCE—VALIDITY OF POLICY—PRINCIPAL AND AGENT.**

The evidence did not authorize a finding that the agent of the insurance company who issued the policy was also agent for the insured, so as to invalidate the contract. The policy having been duly issued and delivered, the failure of the agent to comply with the instructions of his principal, which were not communicated to the insured, to attach to the policy a "rider," the effect of which would have been to cancel the policy, could not operate to the prejudice of the insured. The sums found as attorney's fees and damages having been written off by the plaintiff, the verdict as thus reduced was demanded by the evidence, and there was no error in overruling the motion for a new trial.

(For other cases, see *Insurance*, Cent. Dig. §§ 180-182, 1849, 1850; *Dec. Dig.* § 129.)

Error from City Court of Elberton; Geo. C. Grogan, Judge.

Action by Mrs. I. O. Tabor and others against the Southern States Fire Insurance Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

H. M. Rylee, of Athens, for Plaintiff in Error.
Worley & Nall, of Elberton, for Defendants in Error.

POTTE, J.

Judgment affirmed.

* Decision rendered, Jan. 20, 1914. 80 S. E. Rep. 536. Syllabus by the Court.

**SUPREME COURT OF KANSAS.**

DENT

vs.

NATIONAL FIRE INS. CO.***APPEAL AND ERROR—VERDICT—EVIDENCE.**

The weight and credibility of conflicting evidence is for the jury, and not for the appellate court.

(For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; *Dec. Dig.* § 1002.)

* Decision rendered, Jan. 10, 1914. 137 Pac. Rep. 799.

Appeal from District Court, Johnson County.
 Action by J. H. Dent against the National Fire Insurance Company.
 From judgment for plaintiff, defendant appeals. Affirmed.

Fyke & Snider, of Kansas City, Mo., for Appellant.
 C. L. Randall, of Olathe, for Appellee.

PER CURIAM.

The single question presented is whether or not the verdict is supported by the evidence. The inventory and account books are sufficient for that purpose. The oral testimony was conflicting. Its weight and credibility were matters for the jury to determine, and the conclusion that the documentary evidence was not overthrown cannot be disturbed.

Judgment affirmed.



PRIDE vs. COMMERCIAL UNION INS. CO., LTD., OF LONDON, ENGLAND.*

(Court of Appeals of Alabama.)

1. CONTRACTS—CONSIDERATION—CRIMINAL ACT.

A criminal act is not a valid consideration to support a contract.
 (For other cases, see Contracts, Cent. Dig. §§ 478, 480-497; Dec. Dig. § 105.)

2. INSURANCE—COMMISSIONS—RIGHT TO RECOVER.

Where plaintiff acted as agent for a foreign insurance company without the license required by Acts 1909 (Sp. Sess.) p. 120, the fact that Code 1907, § 4561, required the foreign insurer to obtain a certificate of authority for plaintiff to act as its agent does not preclude the foreign insurer from setting up the illegality of plaintiff's act so as to defeat an action for compensation; there being no such presumption of compliance with the law in favor of a plaintiff seeking to maintain his action on a transaction involving the commission of a crime by himself as would arise in case of an innocent plaintiff.

(For other cases, see Insurance, Cent. Dig. § 131; Dec. Dig. § 105.)

3. PLEADING—COMPLAINT—CONCLUSIONS OF PLEADER.

Where a count in a complaint for money had and received does not set forth the state of facts upon which the defendant was liable, the facts alleged cannot be aided by the pleader's conclusions that defendant was liable.

(For other cases, see Pleading, Cent. Dig. §§ 5½, 66-74; Dec. Dig. § 34.)

4. MONEY RECEIVED—EFFECT OF ASSIGNMENTS.

Where an agent of a foreign insurer sued for money had and received, on the theory that the insurer had assigned to him a percentage of the commissions to be paid by those insured, the insured, unless they consented to such partial assignment, were under no liability to him

* Decision rendered, Nov. 13, 1913. Rehearing denied, Dec. 9, 1913. 63 South. Rep. 803.

as assignee, and were entitled to pay the whole amount of the premium to the insurer as if no assignment had been made.

(For other cases, see Money Received, Cent. Dig. §§ 15, 21-27; Dec. Dig. § 6.)

5. MONEY RECEIVED—RIGHT OF ACTION—OBLIGATION.

When it is claimed that a payment by debtor was in part for the use of a third person, the claim cannot be supported, unless something more is shown than the mere fact of payment, and that the creditor was under promise to the third person that he should have part of the amount paid, and, if there is no such showing the rights of such third person must depend wholly upon the promise.

(For other cases, see Money Received, Cent. Dig. §§ 15, 21-27; Dec. Dig. § 6.)

6. ACTION—CRIMINAL ACT.

Where a foreign insurer refused to pay commissions due its broker, who had not procured a license in accordance with the statute, and the broker sued for money received, claiming that insurer received commissions paid by those insured, partly for his benefit, no recovery can be had if for the establishment of the right asserted the broker must show his criminal conduct in writing the insurance without the license.

(For other cases, see Action, Cent. Dig. §§ 25-27, 31-34, 36-39; Dec. Dig. § 5.)

7. CONTRACTS—RECOVERY—ILLEGAL CONTRACTS.

While the illegality of the contract is no defense to an action for money paid by one of the parties for the use of the other, where the contract has been fully executed, yet where an insurance broker wrote insurance for a foreign insurer without having procured the statutory license, no action for money received can be maintained against the insurer, even though it agreed to pay him a percentage of the premiums received, for the contract was not fully executed on the part of the insurer by accepting the premiums, and the only consideration was the broker's illegal conduct.

(For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.)

8. CONTRACTS—RECOVERY—ILLEGAL CONTRACTS.

The reason that the law will not permit a recovery on an illegal contract is based on public policy, and not to protect the defendant, who sets up and relies on the illegality of the contract.

(For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.)

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Action by Thomas E. Pride against the Commercial Union Insurance Company, Ltd., of London, England, for money had and received. Judgment for defendant, and plaintiff appeals. Affirmed.

Tennis Tidwell, of New Decatur, for Appellant.
E. W. Godbey, of Decatur, for Appellee.

**ERICKSON vs. INSURANCE CO. OF NORTH AMERICA
ET AL.—SAME vs. CITIZENS' INS. CO. OF MISSOURI.***

(Supreme Court of Florida.)

1. LIMITATION OF ACTIONS—PLEADING—DEMURRER—STATUTE OF LIMITATIONS.

Where the face of a bill in chancery shows a case barred by the statute of limitations, and no circumstances are stated which take the case out of the operation of the statute, the defendant may take advantage of it by demurrer.

(For other cases, see Limitation of Actions, Cent. Dig. §§ 670-675, 681; Dec. Dig. § 180.)

2. LIMITATION OF ACTIONS—REFORMATION OF INSTRUMENTS—LACHES.

Where suit to reform and enforce a fire insurance policy is not commenced within five years from the accrual of the right of action, or within one year after a judgment at law for the plaintiff on the policy has been reversed on appeal or writ of error, the suit is barred by the statute of limitations; and, as equity follows the law, a failure to bring the suit within the statutory period is, under the circumstances, laches.

(For other cases, see Limitation of Actions, Cent. Dig. §§ 539, 545, 553-566; Dec. Dig. § 130; Reformation of Instruments, Cent. Dig. §§ 119-121; Dec. Dig. § 32.)

Appeal from Circuit Court, Dade County; L. W. Bethel, Judge.
Bills by John W. Erickson against the Insurance Company of North America and another. From decrees for defendants, plaintiff appeals.
Affirmed.

Rufus M. Robbins, of Titusville, for Appellant.
Cockrell & Cockrell, of Jacksonville, for Appellees.

* Decision rendered, Nov. 18, 1913. 63 South. Rep. 716. Syllabus by the Court.

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CITIZENS' STATE BANK OF CHAUTAUQUA ET AL. vs. SHAWNEE FIRE INS. CO.*

(Supreme Court of Kansas.)

1. INSURANCE—POLICY—VALIDITY—PRINCIPAL AND AGENT.

An agent of an insurance company with power to issue policies insured a property on which the bank of which he was cashier held a mortgage for about one-half the amount of the insurance, attaching a clause making the loss, if any, payable to the mortgagee as its interest should appear. Held that, in the absence of fraud or collusion, the company could not deny liability on account of its agent's relation to such mortgagee.

(For other cases, see Insurance, Cent. Dig. § 123; Dec. Dig. § 93.)

* Decision rendered, Dec. 6, 1913. 137 Pac. Rep. 78. Syllabus by the Court.

2. PRINCIPAL AND AGENT—DUAL RELATION—FRAUD.

The rule that one cannot serve two masters does not apply when loyalty to one involves no breach of duty to the other. Fraud is not necessarily to be presumed from mere duality of relation.

(For other cases, see *Principal and Agent*, Cent. Dig. § 588; Dec. Dig. § 157.)

3. INSURANCE—POLICY—VALIDITY—MORTGAGED PROPERTY

A mortgage clause that the loss, if any, shall be payable to the mortgagor as his interest may appear, "subject to the terms and conditions of the policy," does not relieve the insurer from liability upon a policy containing a condition that it shall be avoided by proceedings to foreclose any mortgage on the property; the insuring of a mortgage lien being sufficient indication that the company must have contemplated a possible or probable foreclosure. When an insurance contract prepared by the insurer contains ambiguous or inconsistent provisions, it will be construed so as to uphold rather than defeat the indemnity.

(For other cases, see *Insurance*, Cent. Dig. §§ 292, 294-298, 794-822, 825; Dec. Dig. §§ 146, 328.)

Appeal from District Court, Shawnee County.

Action by the Citizens' State Bank of Chautauqua, Kan., and another against the Shawnee Fire Insurance Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Mulvane & Gault and D. R. Hite, all of Topeka, for Appellant.

W. H. Sproul, of Sedan, W. S. Roark, of Topeka, Carr W. Taylor, of Hutchinson, and Lee Monroe, of Topeka, for Appellees.



**SCHMIDT vs. WILLIAMSBURGH CITY FIRE INS. CO.
OF BROOKLYN, N. Y. (No. 17,472.)***
(Supreme Court of Nebraska.)

1. TRIAL—DIRECTION OF VERDICT—EVIDENCE.

Unless plaintiff and defendant at the close of the evidence each request a directed verdict in his favor, the district court is not authorized to determine disputed questions of fact. If such a request is made by one party alone, it is only when the testimony on behalf of the other party will not support his cause of action or his defense that the court may direct the jury to render a verdict in favor of the moving party.

(For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.)

2. INSURANCE—NOTICE TO AGENT OF INSURER—VACATION OF PREMISES.

Notice and knowledge of the existence of a vacancy in the insured premises, or of the occurrence of a fire in the same to such an extent as to

* Decision rendered, Jan. 7, 1914. 144 N. W. Rep. 1044. Syllabus by the Court.

make them uninhabitable, communicated to the local agent of the defendant, authorized to issue policies and transact the usual business of a recording agency, is the knowledge of the insurance company.

(For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. § 378.)

SURANCE—POLICY—FORFEITURE—RETURN OF UN-EARNED PREMIUM.

Where a policy provides the policy "shall be void * * * if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days," and also provides: "If this policy shall * * * become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate"—the company is not bound to return any unearned premium, unless the policy is surrendered.

(For other cases, see Insurance, Cent. Dig. §§ 457-467; Dec. Dig. § 198.)

4. INSURANCE—POLICY—FORFEITURE—WAIVER.

Where, under such policy, the insurer has no notice or knowledge of the breach of a condition in the policy making it void in case the premises are vacant or unoccupied for more than ten days, and did not learn until after the premises were totally destroyed that the building had been so damaged by previous fires as to be uninhabitable, and had so remained for several weeks before the loss occurred, the fact that the adjuster for the company, while declaring that the policy was void, and that the insurer was not liable, offered a larger sum than the unearned premium for a surrender of the policy does not of itself constitute a waiver of the forfeiture.

(For other cases, see Insurance, Cent. Dig. §§ 1026, 1027, 1030, 1035, 1040, 1057; Dec. Dig. § 388.)

Appeal from District Court, Douglas County; Sears, Judge.

Action by Anna Schmidt against the Williamsburgh City Fire Insurance Company of Brooklyn, N. Y. From judgment for plaintiff, defendant appeals. Reversed.

Greene, Breckenridge, Gurley & Woodrough, of Omaha, for Appellant.

A. S. Ritchie, of Omaha, for Appellee.



ST. PAUL FIRE & MARINE CO. vs. BRAGG.*

(Supreme Court of Oklahoma.)

INSURANCE—ACTION ON POLICY—PETITION—ELECTION TO CANCEL.

In an action on a fire insurance policy containing the following clause:
"This entire policy shall be void at the election of the company, if, without the consent of the secretary or general agent of the com-

* Decision rendered, Dec. 20, 1913. 137 Pac. Rep. 715. Syllabus by the Court.

pany indorsed thereon, any other insurance is now or shall be taken out on any of the property above described,"—where the answer alleges a violation of this clause by the insured in taking out additional insurance on the same property covered by the policy in suit, without the knowledge or consent of the company, but fails to allege a compliance with the terms of the policy which prescribes that in case the company elects to cancel the policy it shall do so "by returning to the assured the pro rata unearned premium, if it has been paid, or, if not, by indorsing the amount thereof on any unpaid premium note and giving written notice thereof to the assured," and does not allege payment or tender to the assured of the pro rata unearned premium, and the giving of written notice to the assured, does not sufficiently plead an election on the part of the company to declare the policy void.

(For other cases, see *Insurance, Cent. Dig.* § 537; *Dec. Dig.* § 249.)

Commissioners' Opinion, Division No. 2. Error from District Court, Comanche County; J. T. Johnson, Judge.

Action by G. W. Bragg against the St. Paul Fire & Marine Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Houston & Brooks, of Wichita, Kan., and Chas. Mitschrich, of Lawton, for Plaintiff in Error.

H. C. Stubblefield and Hudson & Whalin, all of Lawton, for Defendant in Error.



COMMERCIAL UNION ASSUR. CO., LTD., OF LONDON, ENGLAND, *vs.* WOLFE.*

(Supreme Court of Oklahoma.)

1. APPEAL AND ERROR—REVIEW—FINDINGS OF FACT.

The questions at issue in the action, being (1) whether or not a proper demand had been made for the production of the books and inventory provided for by the iron safe and inventory clause in the standard form of fire insurance policy, and (2) whether or not the insured's failure to produce his books and inventory is due to his fault or negligence, are questions of fact to be submitted to the jury, under proper instructions, as to the law governing, and the finding of the jury thereon, being supported by sufficient evidence, will not be disturbed.

(For other cases, see *Appeal and Error, Cent. Dig.* §§ 3908-3911; *Dec. Dig.* § 996.)

2. EVIDENCE—BEST AND SECONDARY.

The best evidence the nature of the cause will permit of shall always be required, if possible to be had; but, if not possible, then the best evidence that can be had shall be allowed.

(For other cases, see *Evidence, Cent. Dig.* §§ 460-470; *Dec. Dig.* § 157.)

* Decision rendered, Jan. 13, 1914. 137 Pac. Rep. 704. Syllabus by the Court.

3. EVIDENCE—BEST AND SECONDARY.

Where the last inventory and books of the assured have been lost or stolen through no fault of his, it is not error to admit oral proof to establish the value of the property destroyed by the fire.

(For other cases, see Evidence, Cent. Dig. §§ 580-594; Dec. Dig. § 178.)

Commissioners' Opinion, Division No. 2. Error from Superior Court, Pottawatomie County; Geo. C. Abernathy, Judge.

Action by C. Dale Wolfe, trustee of the estate of D. A. Trotter & Co., against the Commercial Union Assurance Company, Ltd., of London, England. Judgment for plaintiff, and defendant brings error. Affirmed.

Burwell, Crockett & Johnson, and Scothorn, Caldwell & McRill, all of Oklahoma City, for Plaintiff in Error.

Lydick & Eggerman, of Shawnee, for Defendant in Error.



WILLIS ET AL. VS. HORTICULTURAL FIRE RELIEF OF OREGON.*

(Supreme Court of Oregon.)

1. EXCEPTIONS, BILL OF—REQUISITES—INCORPORATION OF EVIDENCE.

A purported bill of exceptions, including only a copy of the instructions, with a note of exceptions to four of them, and containing no statement of so much of the evidence or other matter as is necessary to explain it, as provided by L. O. L. § 171, is not a proper bill of exceptions, though accompanied by a transcript of all the evidence, exhibits, and instructions.

(For other cases, see Exceptions, Bill of, Cent. Dig. § 19; Dec. Dig. § 18.)

2. APPEAL AND ERROR—REVIEW—EVIDENCE.

The Supreme Court will not review the evidence on the appeal of a law case at the suggestion of the appellant to determine what verdict should have been rendered, though it may, when it has determined that there is error, examine the evidence to determine whether it may affirm notwithstanding the error or direct what judgment shall be entered.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3893-3896; Dec. Dig. § 987.)

3. APPEAL AND ERROR—RECORD—QUESTIONS PRESENTED FOR REVIEW.

Though a bill of exceptions contains no statement of the evidence or other matters necessary to explain it, yet if instructions objected to appear, in the light of the pleadings, to be erroneous, they may be reviewed.

(For other cases, see Appeal and Error, Cent. Dig. §§ 2933-2935; Dec. Dig. § 701.)

* Decision rendered, Jan. 13, 1914. 137 Pac. Rep. 761.

4. INSURANCE—FORFEITURE—FALSE PROOFS OF LOSS.

Under the provision of an insurance policy provided for by L. O. L. § 4666, that the policy shall be void in case of any fraud or false swearing by the insured relating to the insurance, whether before or after a loss, false swearing as to a loss, to avoid the policy, must have been knowingly and willfully false, with the effect of deceiving and misleading.

(For other cases see *Insurance*, Cent. Dig. §§ 1362-1366; Dec. Dig. § 553.)

5. INSURANCE—FALSE PROOFS—FRAUD—INTENTION.

In an action on a policy which provides that it shall be void in case of fraud or false swearing by the insured, instructions that the false statement must have been made with knowledge of its falsity "and with the intention of defrauding the company" are erroneous in adding the quoted qualification.

(For other cases, see *Insurance*, Cent. Dig. §§ 1362-1366; Dec. Dig. § 553.)

Department 2. Appeal from Circuit Court, Lake County; Henry L. Benson, Judge.

Action by Richard Willis and another, partners under the firm name of the Willis Furniture Company, against the Horticultural Fire Relief of Oregon, a corporation. From a judgment for plaintiff for \$6,000, defendant appeals. Reversed and remanded.

This is an action to recover upon two fire insurance policies covering the same stock of goods, one for the sum of \$2,000 and the other for \$4,000, for loss sustained by a fire which occurred on February 5, 1912; plaintiffs alleging total loss of \$7,200. The insurance company as a defense alleges, among other things, that plaintiffs' loss by the fire was only \$3,000; that the proof of loss sustained by plaintiff shows the stock of goods insured in total as of the value of \$9,968.97, when in fact plaintiff Richard Willis, who made affidavit as to the amount of the loss, himself saved from the fire five pieces of furniture of the value of \$70, and stated in his proof that at the time of the fire there were eighty-one iron and brass bedsteads of the stock destroyed, of the value of \$451, when in fact there were but thirty-two, making other false statements as to the amount or value of the loss. The case was tried before a jury, and judgment rendered in favor of plaintiff for \$6,000, from which judgment defendant appeals.

John Bayne, of Salem (L. F. Conn, of Lakeview, on the brief), for Appellant.

J. C. Rutenic, of Klamath Falls (W. Lair Thompson, of Lakeview, and J. S. Kent, of Klamath Falls, on the brief), for Respondents.

NORTHERN ASSUR. CO., LTD., OF LONDON, ET AL. vs. MORRISON.*

(Court of Civil Appeals of Texas. Dallas.)

1. INSURANCE—ACTIONS ON POLICIES—TIME FOR BRINGING.

Under Rev. Civ. St. 1911, art. 4874, providing that a fire insurance policy in case of total loss shall be a liquidated demand against the company for the full amount thereof, except that this shall not apply to personal property, a provision of a policy that the sum for which the company was liable thereunder should be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of loss had been received by the company did not apply, where there was a total loss and a denial of liability, and suit could be brought on the policy without waiting sixty days; since in such a case no notice or proof of loss is required, and to apply such provision would make the time of payment indeterminate.

(For other cases, see Insurance, Cent. Dig. §§ 1542, 1543; Dec. Dig. § 621.)

2. EVIDENCE—COMPETENCY—TELEPHONE COMMUNICATION

In an action by the assignee of an insurance policy, evidence was admissible that insured, in the presence of the witness, called the office of the insurer's agent on the telephone and told some person who answered that the policy and property covered thereby had been transferred and for him to make a note of it, though the witness did not know to whom insured was talking.

(For other cases, see Evidence, Cent. Dig. § 438; Dec. Dig. § 148.)

3. EVIDENCE—DECLARATIONS OF THIRD PERSONS—RES GESTÆ.

Where insured, at the time of the transfer of a policy and property covered thereby, called the office of the insurer's agent on the telephone and told some person in the office of the transfer, evidence that he then told a witness that the policy was transferred, and that the matter would be agreed to by the agent, was not hearsay, but was admissible as a part of the res gestæ.

(For other cases, see Evidence, Cent. Dig. §§ 351-368; Dec. Dig. § 123.)

4. EVIDENCE—ACTIONS ON POLICIES—SUFFICIENCY OF EVIDENCE.

In an action on an assigned insurance policy, evidence as to the mailing of a letter by the assignee to the insurer's agent, telling him of the assignment, held sufficient to justify the admission in evidence of a copy of the letter.

(For other cases, see Evidence, Cent. Dig. §§ 638-641; Dec. Dig. § 184.)

5. TRIAL—QUESTION FOR JURY.

Where there was evidence that a letter was mailed, whether it was received by the addressee, since deceased, was a question for the jury, though it could not be found among the addressee's papers.

(For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.)

*Decision rendered, Dec. 20. 1913. Rehearing denied, Jan. 10, 1914. 162 S. W. Rep. 411.

6. INSURANCE—ACTIONS ON POLICIES—INSTRUCTIONS.

In an action on an insurance policy which provided that it should be void if any change took place in the interest, title, or possession of the property insured, or if the policy was assigned, unless otherwise provided by an agreement indorsed thereon or added thereto, an instruction that mere notification to the insurer of a transfer was not sufficient to change the character of the stipulation in the policy, that notification on the part of the insured, and assent thereto on the part of the insurer was required, and that if notification was given by insured and received by the insurer, assent would be presumed, unless the insurer declined to accept the transfer so made, was correct and not erroneous, as placing the burden on the insurer to prove its nonconsent, not contradictory.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1771-1784; Dec. Dig. § 669.)

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Action by Hiram Morrison against the Northern Assurance Company, Ltd., of London, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Crane & Crane, of Dallas, for Appellants.
Brooks & Worsham, of Dallas, for Appellee.

ACCIDENT AND HEALTH.

COURT OF APPEALS OF KENTUCKY.

FARNLEY'S ADM'R

vs.

PHILADELPHIA LIFE INS. CO.*

1. INSURANCE—ACCIDENT INSURANCE—ACTIONS—PRE-SUMPTIONS.

In an action on an accident policy, which excepted liabilities for suicide, the presumption that death by drowning was accidental, and not suicidal, arises only after the introduction of evidence of the circumstances surrounding the death compatible either with the theory of accidental death, or with suicide, and cannot be based merely on proof of drowning.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.)

2. PLEADING—JUDGMENT ON PLEADINGS.

In an action on an accident policy excepting death by suicide, judgment was properly directed for defendant on the pleadings, where the petition did not aver that the death was accidental, and the answer did not cure the error; the evidence not disclosing the manner of death other than that it was by drowning.

(For other cases, see Pleading, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.)

3. JUDGMENT—CONCLUSIVENESS—MATTERS CONCLUDED.

A judgment on the pleadings in an action on an accident policy, in favor of defendant because of plaintiff's failure to allege that the death was accidental, is in effect a dismissal of the petition for failure to state a cause of action and is not a bar to a future action.

(For other cases, see Judgment, Cent. Dig. § 998; Dec. Dig. § 569.)

4. COSTS—IMPOSITION OF COSTS.

Under the direct provisions of Civ. Code Prac. § 93, a defendant who fails to demur to a petition which does not state a cause of action is liable for all costs arising after the filing of the answer, even though judgment on the pleadings was directed in its favor after the close of the case.

(For other cases, see Costs, Cent. Dig. §§ 297-303; Dec. Dig. § 71.)

Appeal from Circuit Court, McCracken County.

Action by Frank R. Farnsley's administrator against the Philadelphia Life Insurance Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Bradshaw & Bradshaw, of Paducah, for Appellant.
Reed & Reed, of Paducah, for Appellee.

* Decision rendered, Jan. 8, 1914. 161 S. W. Rep. 1111.

HANNAH, J.

This action was instituted on what is usually termed an "accident insurance policy," insuring Frank R. Farnsley against "accidental death (suicide, sane or insane, not covered) * * * for loss of life, seven hundred dollars." The petition, after setting out plaintiff's capacity to sue and its appointment as administrator of the estate of Frank R. Farnsley, is as follows: "Plaintiff says that on the 4th day of December, 1912, the defendant, the Philadelphia Life Insurance Company, a corporation of Philadelphia, Pa., engaged in the life and accident insurance business, issued and delivered to the plaintiff's decedent its policy of insurance, under the terms of which, in consideration of \$1.75 to be paid monthly by the decedent, and which monthly payment for December, 1912, was paid to the defendant, the defendant undertook and obligated itself to pay his administrator, in the event of his death during the life of said policy, the sum of \$700. Plaintiff says that promptly after the death of the decedent, which occurred during the life of said policy (December 23, 1912), the defendant was notified in writing at its home office in the city of Philadelphia, Pa., of the death of decedent; and that the plaintiff did and performed all other acts and things which it was required and bound to do under the terms of the contract between the defendant and plaintiff's decedent. Said contract of insurance is filed herewith as a part hereof marked 'Exhibit B.'"

The policy so filed and made part of the petition shows that defendant is obligated to pay the amount of said policy only in the event of insured's "accidental death (suicide, sane or insane, not covered)." The petition contains no allegation as to the manner or cause of the death of the insured. The exhibit therefore contradicts and virtually destroys the petition because of its lack of an allegation concerning the manner of the death of insured, or that same was accidental.

The answer merely traversed the petition, and skillfully avoids curing the defects thereof. Upon the trial, plaintiff introduced but two witnesses, the widow and daughter of decedent. The widow was asked as follows: "Q. Is Capt. Frank R. Farnsley now living or dead? A. He is dead. Q. State, if you know, of what he died. A. He was drowned. Q. When? A. December 23, 1912." The daughter was asked: "Q. Now living or dead? A. Dead. Q. When did he die? A. December 23, 1912." This is all the evidence in regard to said Farnsley's death. The defendant refused to offer any evidence. Seemingly without any motion by either party, the court instructed the jury to find for the plaintiff the sum of \$700 with interest from April 16, 1913, which they did. Thereupon defendant filed a written motion to render judgment for it on the pleadings notwithstanding the verdict of the jury, which motion was sustained by the court,

and a judgment was entered that "the plaintiff take nothing by its petition and that the defendant do recover of the plaintiff its costs herein expended."

It will be seen that the petition fails to show any fact or circumstance from which it can be inferred that the death of decedent was an accident, and the evidence is likewise silent upon that point, except that it shows that he was drowned, but not the manner of the drowning.

[1, 2] It is insisted by appellant that the evidence that he was drowned is sufficient to sustain a presumption that it was an accidental death, and a number of decisions of this court are cited in support of this contention. *Aetna Life Ins. Co. vs. Kaiser*, 115 Ky. 539, 74 S. W. 203, 24 Ky. Law Rep. 2454; *Union Casualty & Surety Co. vs. Goddard*, 76 S. W. 832, 25 Ky. Law Rep. 1035; *Masonic Life, etc., Ass'n vs Pollard's Guardian*, 121 Ky. 349, 89 S. W. 219, 28 Ky. Law Rep. 301, 123 Am. St. Rep. 198. An examination of the line of authorities cited by appellant, however, demonstrates that it was shown in evidence in those cases that the insured was found dead, there being no eyewitness or evidence as to the manner of death; and, in such cases, the law presumes that death was accidental. Here appellee failed to show that the manner of the death of the insured was unknown; and, if the manner of death was unknown (that is, whether the drowning was accidental or suicide), that state of fact should have been proved in order that plaintiff might be entitled to the presumption that attaches to death by drowning in an unknown manner. That presumption becomes operative only after the introduction of evidence compatible either with the theory of accidental death or with the theory of suicide. In such cases, the law presumes accidental death rather than suicide. The court therefore properly sustained the motion of defendant for judgment upon the pleadings.

[3, 4] The judgment appealed from in effect dismisses the petition on defendant's objection that same fails to state a cause of action, as no trial was had of the action upon its merits and is no bar to any future action. This objection should have been made by the defendant by demurrer before or at the time of the filing of its answer; and, because of its failure to demur, it is liable for all the costs arising in the lower court after the filing of said answer, together with the costs in this court. Civil Code, § 93.

Judgment reversed for judgment as herein indicated.

SUPREME JUDICIAL COURT OF MAINE**BRUZAS***vs.***PEERLESS CASUALTY CO.*****1. INSURANCE—ACCIDENT POLICY—SICKNESS—PROOF OF DISABILITY.**

Where an accident policy insuring against sickness provided that the insured, in order to recover benefits, must have been "necessarily and continuously confined within the house," proof that he was "wholly and continuously disabled, suffering from walking typhoid fever" during a specified period for which indemnity was claimed, was insufficient.

(For other cases, see Insurance, Cent. Dig. § 1310; Dec. Dig. § 525.)

2. INSURANCE—ACCIDENT POLICY—SICKNESS—PROOF OF DISABILITY.

Where a sick benefit policy required that insured must not only be necessarily and continuously confined within the house, but must be regularly visited by a legally qualified physician at least once every seven days, in order to recover indemnity, there could be no recovery for a period between June 24, 1912, and July 1st following; no physician having been called during such period.

(For other cases, see Insurance, Cent. Dig. § 1310; Dec. Dig. § 525.)

3. INSURANCE—HEALTH POLICY—PREMIUMS—PAYMENT—TIME—DEFAULT—WAIVER.

Where defendant health insurance company not only accepted and retained a premium payment which was due July 1st, but which was not paid until July 24th, but accepted and retained overdue premiums for the succeeding months of August, September, and October, and on October 29th accepted an advance premium for November insurance, failure to pay the July premium in advance was waived, and plaintiff was therefore not barred, because of such default, from the right to recover sick benefits accruing between July 5th and 24th.

(For other cases, see Insurance, Cent. Dig. §§ 1041-1056, 1058-1070; Dec. Dig. § 392.)

4. INSURANCE—HEALTH POLICY—PROVISIONS—CONSTRUCTION—OVERDUE PREMIUMS—WAIVER OF DEFAULT.

A provision in a health policy that the acceptance of any overdue premium or premiums should not constitute a waiver of the requirement that all renewal premiums must be paid in advance did not affect the rule that acceptance of overdue premiums waived the policyholder's default in not paying them in time, since such provision applies only to the future.

(For other cases, see Insurance, Cent. Dig. §§ 1041-1056, 1058-1070; Dec. Dig. § 392.)

5. INSURANCE—SICK BENEFIT POLICY—PROVISIONS.

A policy insuring against illness provided that the acceptance of any

* Decision rendered, Dec. 18, 1913. 89 Atl. Rep. 199.

renewal premiums should be optional with the insurer, and, if payment of renewal premium should be made after the expiration of the policy or of the last renewal receipt, neither the assured nor the beneficiary would be entitled to recover "for any illness originating before the expiration of thirty days after the date of such renewal payment." Held, that the quoted language should be construed to mean thirty days after payment of the renewal premium without reference to the past; and hence such provision had no application to an illness existing at the time of the payment of a renewal premium of which the insurer had notice.

(For other cases, see Insurance, Cent. Dig. §§ 1041-1056, 1058-1070; Dec. Dig. § 392.)

Exceptions from Supreme Judicial Court, Cumberland County.

Action by Joseph Bruzas against the Peerless Casualty Company. Judgment for plaintiff, and defendant brings exceptions. Overruled.

Connellan & Connellan, of Portland, for Plaintiff.
Charles G. Keene, of Portland, for Defendant.

CORNISH, J.

Action of assumpsit on a policy of accident and illness indemnity insurance.

On January 5, 1911, the defendant issued a policy to the plaintiff insuring him, in consideration of a premium of \$1.75 paid, against accident and illness until February 1st following, and for such further period as premium payments should be made thereon in accordance with the terms of the policy. These premium payments were made payable monthly in advance and were due on the first day of each month for the month ensuing.

The plaintiff continued to make the monthly payments, sometimes in advance, but often when overdue. The renewal premium due June 1st was paid in advance on May 8th, that for July on July 24th, for August on August 5th, for September on September 5th, for October on October 3d, and for November in advance on October 29th.

According to the agreed statement of facts: "The plaintiff on the 24th day of June, 1912, became ill and ceased work, believing that a rest would restore his strength, not suffering any great amount of pain, but being weak. He rested until the 5th day of July, A. D. 1912, at which time, his condition not improving, he consulted a physician. From this date until October 1, 1912, he was necessarily and continuously confined within the house and therein regularly visited by a legally qualified physician at least every seven days. From the 1st day of October, 1912, to the 1st day of December, 1912, while convalescent, he was unable to work and not continuously confined to the house, entitling him to partial benefits if the referee should find this action can be maintained. The case was diagnosed as walking typhoid fever. The plaintiff gave all proper notices and affirmative proof to the defendant, as provided for by the policy, and filed with the defendant at proper time all certificates, notices,

reports, etc., required under the terms of the policy. The plaintiff was wholly and continuously disabled, suffering from walking typhoid fever, a disease which requires regular attendance by a physician, from the 24th day of June, A. D. 1912, to the 5th day of July, A. D. 1912; but the said plaintiff was not attended by any physician from said 24th day of June, to said 5th day of July, A. D. 1912."

Upon this agreed statement the presiding judge, who heard the case without the intervention of a jury, rendered judgment in favor of the plaintiff in the sum of \$71, and the defendant alleged exceptions.

It being uncontested that the plaintiff took out his policy on January 5th and made payment thereafter of each renewal premium for a period of ten months, although not always on the prescribed date (in other words, paid premiums for insurance from January 5th to December 1st), all of which sums the defendant accepted, retained, and still retains, it being also admitted that the plaintiff fell sick on June 24th and was "necessarily and continuously confined within the house and therein regularly visited by a legally qualified physician from July 5th until October 1st" and was convalescing but unable to work from October 1st to December 1st, it would seem as if he should be entitled to some of the benefits for which he was paying; and the inquiry naturally arises: What can be the grounds on which the company resists all liability?

The defendant divides the whole term of the plaintiff's disability, June 24th to December 1st, into five component parts and discusses each separately. We will follow the same order.

1. Period from June 24th to July 1st.

[1] The renewal premium for the entire month of June having been paid in advance on May 8th, the policy was admittedly in force on the day the plaintiff fell sick, June 24th. The agreed statement recites that during this period of seven days the plaintiff "was wholly and continuously disabled, suffering from walking typhoid fever," while the condition of the policy (article 13) is that he must be "necessarily and continuously confined within the house."

The condition of the policy is not fully met. The agreed statement does not rise to the policy requirement, which is a condition precedent to the right of recovery. *Dunning vs. Mass. Mut. Acc. Ass'n*, 99 Me. 390, 59 Atl. 535.

[2] Moreover, the policy further requires, not only necessary and continuous confinement within the house, but also "and therein regularly visited by a legally qualified physician," and regular visitation is defined by another clause in the policy to be "at least once every seven days."

It is conceded that a physician was not called until July 5th, and therefore this condition precedent was not complied with.

For these two reasons the plaintiff cannot recover for this period, June 24th to July 1st.

2. Period from July 1st to July 5th.

No physician was in attendance during this period, and for that reason, as already stated, the plaintiff is barred from recovery.

[3] 3. Period from July 5th to July 24th.

During this time the requirement in regard to attending physician was complied with, but the defendant contends that the insurance was not in force because the renewal premium due and payable July 1st was not paid until July 24th, and the policy had thereby been forfeited. This contention cannot be sustained under the facts in this case. The company not only accepted and retained this premium when overdue, but in like manner accepted and retained overdue premiums for the months of August, September, and October, and then on October 29th accepted the advance premium for the month of November. This constituted a waiver on the part of the company, so that the policy was kept continuously in force.

The company, having full knowledge of the facts, had the option either to treat the policy as lapsed and decline further premiums or to accept the overdue premium and thereby treat it as subsisting. It could not accept and retain the premium and still be freed from liability.

The premiums it retains must be on living, not on dead policies. The lapse of a policy for nonpayment of premiums is waived by the insurer's acceptance of either the overdue or subsequent premiums paid under the policy. This is settled law. *Lally vs. Insurance Co.*, 75 N. H. 188, 72 Atl. 208; *White vs. McPeck*, 185 Mass. 451, 70 N. E. 463; *McNicholas vs. Insurance Co.*, 191 Mass. 304, 77 N. E. 756; *Williams vs. Relief Ass'n*, 89 Me. 158, 36 Atl. 63.

[4] It is true that the policy contains this provision: "Nor shall the acceptance of any overdue premium or premiums constitute a waiver of the requirement that all renewal premiums be paid in advance as specified in the contract."

This in no way conflicts with the rule just stated. The acceptance of overdue premiums does not of itself work a waiver of future prompt payments, but it is a waiver of the condition so far, and so far only, as covered by the overdue payments themselves. It affects and must affect the past, but not necessarily the future. *Crossman vs. Mass. Benefit Ass'n*, 143 Mass. 435, 9 N. E. 753. This is the true construction and limitation of this clause in the policy. To permit it to go further would be contrary to public policy in allowing an insurance company to receive the money of its patrons and to give them nothing in return, thus perpetrating a fraud.

It follows that this policy was valid from July 5th to July

24th, and the plaintiff is entitled to full indemnity at the rate of \$25 per month during that time.

[5] 4. Period from July 24th to October 1st.

For the reasons just stated, this policy was in force during this entire time; the acceptance of the several premiums having worked a waiver of the forfeiture.

But the defendant now calls attention to another condition, which reads as follows: "The acceptance of any renewal premium shall be optional with the company, and if the payment of renewal premium shall be made after the expiration of this policy or of the last renewal receipt, neither the assured nor the beneficiary will be entitled to recovery * * * for any illness originating before the expiration of thirty days after the date of such renewal payment." The first sentence of this condition is of general application and gives the company the right to terminate the insurance at the expiration of any premium period. That point is not involved here.

Under the remainder of the provision the defendant argues that as the illness from which the plaintiff was suffering not only originated before the expiration of thirty days after the date of the renewal payment, July 24th, but actually originated on June 24th, which was thirty days before the date of the renewal payment, the plaintiff is precluded from recovery. This contention is in effect that if the illness shall be contracted within thirty days after the delayed renewal premium is paid, or had originated at any time previous to such payment, yet the company is relieved. During all this time the insured may have been making his payments and have been laboring under the conviction that he was insured, and yet the subsequent acceptance of an overdue premium by the company would, on this theory, nullify it all. This, of course, cannot be.

Nor is this the fair import of the language. It is "any illness originating before the expiration of thirty days after the date of such renewal payment." That is, within thirty days after such payment. The date of payment is the initial point of reckoning, and the contemplated period is thirty days subsequent thereto. The past is not taken into consideration. This is the construction which would be placed upon this condition giving the words their ordinary signification. If, as the defendant contends, such was not the intention of the company but it was designed to embrace a period prior to the payment as well as subsequent thereto, the company has failed to make that intention clear. The most that could be claimed is that the language is ambiguous, and, if so, it falls within the familiar rule of construction that it shall be taken most strongly against the insurer, whose language it is. Applying this construction, it will be readily seen that this clause in no way affects the policy. The illness did not originate within thirty days after July 24th, the

date of the delayed renewal payment, but had already originated on June 24th, thirty days before. That being so, the liability of the company cannot be avoided by the clause in question.

It is to be further observed that, when the company accepted the overdue payment on July 24th, it must already have been informed of the plaintiff's illness, because he fell ill on June 24th, and under another provision of the policy it was his duty to give written notice to the company of such illness, within twenty days from the beginning of the illness. The agreed statement does not show the precise day on which notice was given, but it doubtless was prior to the expiration of that twenty days, otherwise that defense would have been set up in this case. Even the extreme limit of twenty days, viz., July 14th, was ten days prior to the acceptance by the company of this overdue premium, so that it accepted the premium having full knowledge of his illness. Under these circumstances it might with reason be held that it waived this provision of the policy which it now invokes. The defendant is plainly liable for the full indemnity between July 24th and October 1st.

5. Period from October 1st to December 1st.

During the period of convalescence, the plaintiff was entitled to half indemnity unless some tenable defense prevents. The only objection made to this is the one already discussed under item 4. The defendant seeks to project the attempted defense to the period of total disability forward into the period of convalescence. Had it been good there, it would have been good here; but, having failed there, it also fails here.

Our conclusion, therefore, is that the plaintiff is entitled to recover at the rate of \$25 per month from July 5th to October 1st, the period of total confinement under a physician's care, and at the rate of \$12.50 per month from October 1st to December 1st, the period of convalescence, a total of \$97.50.

The amount found due by the presiding judge being only \$71, the exceptions of the defendant cannot be sustained, as the ruling was not prejudicial.

Exceptions overruled.



THOMPSON *vs.* INTERSTATE LIFE & ACCIDENT CO.* (Supreme Court of Tennessee.)

1. INSURANCE—LOSSES—DEMAND AND REFUSAL—PENALTY —TIME OF ACTION.

Under acts 1901, c. 141, declaring an insurance company, when a loss occurs, and it refuses to pay it within sixty days after demand, liable to

* Decision rendered, Nov. 29, 1913. 162 S. W. Rep. 39.

pay the policyholder a penalty in addition to the loss, suit must be delayed sixty days after demand only when the company does not answer the demand within that time, and, the refusal being sooner, suit may be commenced immediately thereafter.

(For other cases, see Insurance, Cent. Dig. §§ 1542, 1543; Dec. Dig. § 621.)

2. INSURANCE—LOSSES—DEMAND AND REFUSAL—PENALTY.

Where, on refusal to pay an indemnity under an accident and sick benefit policy, bill therefor and for the penalty provided by Acts 1901, c. 141, was filed, and, additional losses thereafter accruing, amended and supplemental bills to recover them were filed, more than sixty days having elapsed before their filing, the filing of the bill was a sufficient demand, and the filing of the answers, denying liability, a refusal to pay as regards right to recover penalty on the additional losses.

(For other cases, see Insurance, Cent. Dig. § 1498; Dec. Dig. § 602.)

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Suit by Horace G. Thompson against the Interstate Life & Accident Company. Judgment for complainant, and defendant appeals. Affirmed.

Pritchard & Sizer and Chambliss & Chambliss, all of Chattanooga, for Appellant.

Meachan & McGaughy, of Chattanooga, for Appellee.



INDIANA LIFE ENDOWMENT CO. *vs.* PATTERSON. (No. 8,049.)*

(Appellate Court of Indiana, Division No. 1.)

1. CONTRACTS—ACTIONS—ALLEGATIONS OF AFFIRMANCE.

Though Burns' Ann. St. 1908, § 376, provides that a general averment that all conditions precedent have been performed before bringing of an action on contract is sufficient, if the general averment is not relied on, the acts constituting performance must be alleged with particularity.

(For other cases, see Contracts, Cent. Dig. §§ 1664-1676; Dec. Dig. § 335.)

2. APPEAL AND ERROR—HARMLESS ERROR—INSUFFICIENCY OF ALLEGATIONS.

Where the complaint in an action on an insurance policy alleged the waiver by the company of the sufficiency of the proof of injury and disability, which was the only waiver of conditions submitted to the jury, and the jury found against the company on that question, any error in overruling a demurrer to the complaint as not sufficiently alleging the acts constituting waiver was harmless to defendant.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.)

3. INSURANCE—ACTIONS—ALLEGATIONS OF INSURED.

Allegations of the complaint that insured's injury was total and permanent, that he was totally and permanently disabled from performing manual

* Decision rendered, Jan. 6, 1914. 103 N. E. Rep. 817.

labor or business upon which he depended for a livelihood, and was totally and permanently disabled from following his usual occupation, sufficiently alleged total and permanent disability.

(For other cases, see Insurance, Cent. Dig. §§ 1599-1602; Dec. Dig. § 635.)

4. APPEAL AND ERROR — FINDINGS — CONFLICTING EVIDENCE—CONCLUSIVENESS.

The Appellate Court will not disturb a verdict on the ground that it is against the weight of the evidence.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3942; Dec. Dig. § 1003.)

Appeal from Circuit Court, Warrick County; Roscoe Kiper, Special Judge.

Action by John W. Patterson against the Indiana Life Endowment Company. From a judgment for plaintiff defendant appeals. Affirmed.

William D. Hardy and Robinson & Stilwell, all of Evansville, for Appellant.

R. W. Armstrong, of Huntingburg, and F. H. Hatfield, of Evansville, for Appellee.

CASUALTY, SURETY AND MISCELLANEOUS.**UNITED STATES DISTRICT COURT.**

E. D. PENNSYLVANIA.

JUSTICE*vs.***EMPIRE STATE SURETY CO. (No. 1,356.)*****1. PRINCIPAL AND SURETY—CONTRACT—CONSTRUCTION—PAID SURETY—STRICTISSIMI JURIS.**

The rule of strictissimi juris, applicable to relieve an individual voluntary surety, is inapplicable to relieve a paid surety.

(For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.)

2. PRINCIPAL AND SURETY—PAID SURETY—DISCHARGE—CONTRACT—MATERIAL VARIANCE.

A paid surety company can be relieved from its obligation only where a departure from the contract is shown to be a material variance.

(For other cases, see Principal and Surety, Cent. Dig. §§ 146-168; Dec. Dig. § 97.)

3. PRINCIPAL AND SURETY—BUILDER'S CONTRACT—DISCHARGE OF SURETY—VARIANCE—FAILURE TO RETAIN FUNDS.

The bond of a paid surety company for a building contractor provided that the owner should make specified payments during progress of the work and should retain not less than 10 per cent of all payments for work performed and materials furnished until complete performance by the principal. Instead, the owner, at the time of the contractor's default, had paid \$2,000 more than the advance payments provided for by the contract, and had not deducted 10 per cent from any payment. *Held*, that such provision of the bond was for the indemnity and benefit of the surety, as well as the owner, and the latter's failure to comply therewith constituted a material variance, which relieved the surety from liability, without proof of actual injury therefrom.

(For other cases, see Principal and Surety, Cent. Dig. §§ 162-165; Dec. Dig. § 100.)

At Law. Action by George L. Justice against the Empire State Surety Company. On motion for new trial. Denied.

Sydney Young and William W. Montgomery, Jr., both of Philadelphia, Pa., for Plaintiff.
Hepburn, Carr & Krauss, of Philadelphia, Pa., for Defendant.

* Decision rendered, Nov. 25, 1913. 209 Fed. Rep. 105.

THOMPSON, D. J.

The plaintiff brought suit against the defendant, a surety company, to recover the sum of \$5,047.83 upon a bond entered into by the defendant, as surety, and Francis T. Maguire, as principal, with the plaintiff, conditioned that Maguire, as contractor, should fully perform his contract with the plaintiff for the erection of a house and barn. The contract provided that the total price for the work and material was to be \$14,484 for the house and \$3,750 for the barn. The contract provided for payments of certain sums to the contractor upon certificates of the architects at specified stages in the progress of work. Upon the house five payments, aggregating \$10,200, were to be made during the progress of the work, and upon the barn one payment of \$1,500, the balance to be paid when the contract was completed. The bond was in the sum of \$10,950, and provided, *inter alia* :—

"Second. That the obligee shall retain not less than 10 per centum of all payments for work performed and materials furnished in the performance of said contract, until the complete performance by said principal of all the terms, covenants, and conditions thereof, on said principal's part to be performed."

It appeared at the trial that the plaintiff had made the payments provided for during the progress of the work and an additional payment of \$2,000 to the contractor in excess of the amounts specified in the contract, all upon certificates of the architect, and had not deducted 10 per cent from the amount of any payment. The plaintiff, therefore, had paid the contractor \$13,700 before the contractor defaulted in his contract, which was \$3,170 in excess of the payments due under the terms of the contract and bond. The plaintiff thereupon completed the work at a cost to him of \$621.03, and paid \$7,789.99 to clear the property of liens which had been filed by materialmen and subcontractors. He claimed for those amounts, together with the amounts of undetermined liens, \$920.81, and counsel fees in contesting the liens, \$250, making a total of \$9,581.83, less the amount due the contractor at the time of default, \$4,534, making his total claim \$5,047.83. At the close of the plaintiff's evidence, counsel for the defendant moved for binding instructions upon the ground that the plaintiff had materially varied the terms of the contract by anticipating payments and by failure to deduct from each payment 10 per cent provided for by the bond. The jury was accordingly directed to return a verdict for the defendant.

In the case of *Prairie State Bank vs. United States*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412, Mr. Justice White, in delivering the opinion of the court, said :—

"That a stipulation in a building contract for the retention, until the completion of the work, of a certain portion of the consideration, is as much for the indemnity of him who may be guarantor of the performance of the work as for him for whom the

work is to be performed, that it raises an equity in the surety in the fund to be created, and that a disregard of such stipulation by the voluntary act of the creditor operates to release the sureties, is amply sustained by authority."

The Circuit Court of Appeals in this circuit, in the case of *Fidelity & Deposit Co. vs. Agnew*, 152 Fed. 955, 82 C. C. A. 103, following the rule in *Prairie State Bank vs. United States*, said:—

"The provision in a building or working contract that the contractor or builder shall be paid as the work progresses according to the amount of materials furnished or work performed, upon estimates to be made by the supervising architect or engineer, whether a percentage is to be retained therefrom until the whole is done or not, redounds to the benefit of a surety or guarantor of the party who is to fulfill the contract and upon payment being made in disregard of it there is such a departure from the contract upon which the undertaking of the surety or guarantor is based that he is released. The purpose of such a stipulation is to guard against the consequences of a default, in case the principal contract proves a losing one, or the contracting party for any reason fails to comply, the percentage retained, where that is provided for, affording additional security, as well as holding out an incentive and when it is not observed, and advance or overpayments are made, it is so obviously to the prejudice of the surety that it operates as a discharge as matter of law."

[1] Counsel for plaintiff concedes that the rule of strictissimi juris is applicable in relief of an individual voluntary surety, but insists that it is inapplicable to relieve a paid surety on a contractor's bond, but actual damage must be proved at the trial. While the question as to whether the rule applies to a paid surety company does not appear to have been raised in the case of *Fidelity & Deposit Co. vs. Agnew*, it is apparent that the defendant was such a surety company. In discussing that question in the case of *Guaranty Co. vs. Pressed Brick Co.*, 191 U. S. 422, 24 Sup. Ct. 143, 48 L. Ed. 242, Mr. Justice Brown said:—

"Counsel for the Brick Company argued with much persuasiveness that this rule of strictissimi juris, though universally accepted as applicable to the undertaking of an ordinary guarantor, who is usually moved to lend his signature by motives of friendship or expectation of reciprocity, and without pecuniary consideration, has no application to the guaranty companies, recently created, which undertake, upon the payment of a stipulated compensation and as a strictly business enterprise, to indemnify or insure the obligee in the bond against any failure of the obligor to perform his contract. It is, at least, open to doubt, however, whether any relaxation of the rule should be permitted as between the obligee and the guarantor, which may have signed the guaranty in reliance upon the rule of strictissimi juris, and with the understanding that it is entitled to the ordinary protec-

tion accorded to guarantors against changes in the contract or extensions of the time of payment."

In that case, in which the breach consisted in an extension of time for payment to subcontractors, the court said:—

"Not knowing when or by whom these materials will be supplied, or when the bills for them will mature, it can make no difference to him whether they were originally purchased on a credit of sixty days, or whether, after the materials are furnished, the time for payment is extended sixty days, and a note given for the amount maturing at that time. If a person deliberately contracts for an uncertain liability, he ought not to complain when that uncertainty becomes certain. * * * The rule of strictissimi juris is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation, which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the subcontractor, with a view of furthering the beneficent object of the statute."

[2] The courts generally hold that a paid surety company can be relieved from its obligation of suretyship only where a departure from the contract is shown to be a material variance. *Young vs. American Bonding Co.*, 228 Pa. 373, 77 Atl. 623; *Philadelphia vs. Fidelity & Deposit Co.*, 231 Pa. 208, 80 Atl. 62, Ann. Cas. 1912B, 1085; *Brown vs. Title Guarantee & Trust Co.*, 232 Pa. 337, 81 Atl. 410, 38 L. R. A. (N. S.) 698; *United States vs. U. S. Fidelity & Guaranty Co. (C. C.)* 178 Fed. 721.

[3] After a somewhat careful examination of the cases, I have been unable to find any case in which the relaxation of the rule of strictissimi juris was extended as between the surety and the obligee in the bond to the extent of requiring proof of actual injury in the case of breach of the terms of the bond by anticipation of payments by the obligee to the contractor. In such case, for the reasons stated in *Prairie State Bank vs. United States*, and *Fidelity Co. vs. Agnew*, and upon the authorities there cited, anticipation of payments by the obligee is held as a matter of law to be a material variance from the terms of the contract.

My opinion is that there was no error in giving binding instructions, and therefore the motion for new trial is denied.

CITY COURT OF NEW YORK.

TRIAL TERM.

LEE

vs.

BARRETT ET AL.*

**INSURANCE—LOSS OF GOODS—INSURANCE—PAYMENT—
LOAN—EFFECT—RIGHT TO SUE.**

Plaintiff's assignor having insured certain goods, which were lost while in the custody of defendants, common carriers, the insurance company gave plaintiff's assignor \$733.73, taking a receipt, reciting that the money was received as a loan and repayable only to the extent of any net recovery plaintiff's assignor might make from the carriers for loss of the property, or from any insurance effected by the carriers, and as security for such repayment the recovery was pledged, etc. *Held*, that such payment did not constitute a payment of the insurance, so as to subrogate the insurer to the rights of plaintiff's assignor, and that an action against the carriers was properly brought by plaintiff.

(For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.)

Action by Albert R. Lee against Clarence M. Barrett and another, doing business as partners under the firm name of A. J. Barrett & Co. submitted on agreed statement of facts. Judgment for plaintiff.

Roelker, Bailey & Stiger, of New York City, for Plaintiffs.
Charles Franklin, of New York City, for Defendants.

FINELITE, J.

The action is brought to recover damages for the loss of personal property under a bill of lading. The defendants are co-partners, doing business as common carriers in the city of New York under the firm name of A. J. Barrett & Co. On January 23, 1913, defendants agreed with one P. C. Kuyper & Co., custom house brokers, of the borough of Manhattan, for a valuable compensation to be paid, to carry a case of dress trimmings from the United States customs appraisers' stores, in the borough of Manhattan, to the E. L. Brady Company, at No. 22 West Thirty-fourth street, city of New York. The said P. C. Kuyper & Co. were acting as the agents of said E. L. Brady Company. The goods were the property of the E. L. Brady Company, but said goods have never been delivered to the said E. L. Brady Company, but were lost in transit while in the custody of the defendants. The said E. L. Brady Company held a policy of insurance, duly issued by the Federal Insurance Company, and the said Federal Insurance Company accepted from the E. L. Brady Company an application for the insurance of the goods

* Decision rendered, October, 1913. 144 N. Y. Supp. 941.

herein involved, and the said Federal Insurance Company delivered to the E. L. Brady Company on March 25, 1913, a check for \$733.73, conditioned upon the giving of a receipt by the E. L. Brady Company, which receipt was given to the said insurance company (and which receipt is hereafter fully set out). The said E. L. Brady Company, after receiving the sum of \$733.73, as aforesaid, with the full knowledge and consent and at the request of the Federal Insurance Company, executed and delivered an assignment of its claim against the defendants to the plaintiff herein individually. The invoice and reasonable value of the goods herein involved was at the time mentioned the sum above stated, no part of which had been paid by defendants and which sum had been duly demanded.

The foregoing is, in substance, the agreed statement of facts as agreed upon between the parties hereto and submitted to the court. The most important question involved herein is: Are the moneys, as aforesaid, so advanced to the E. L. Brady Company in full payment of said loss, or was said money so advanced to said E. L. Brady Company by the said insurance company to be considered as a loan to be recovered from said E. L. Brady Company by said Federal Insurance Company at any time upon said receipt? Said receipt, as annexed to the agreed statement of facts and designated as Exhibit C, reads as follows:—

"Dated N. Y., March 25, 1913. Received from the Federal Insurance Company \$733.73 as a loan, and repayable only to the extent of any net recovery we may make from any carrier, bailee or others on account of loss to our property (described below) by theft from truck, ex Philadelphia from Cherbourg-New York, or from any insurance effected by any carrier, bailee, or others on said property, and as security for such repayment we hereby pledge to the said Federal Insurance Company the said recovery, and deliver to them, duly indorsed, the bills of lading for said property, and we agree to enter and prosecute suit against such railroad, carrier, bailee, or others on said claim with all due diligence at the expense and under the exclusive direction and control of the said Federal Insurance Company. \$733.73. Description of property: One case laces. E. L. Brady Co. CNW. WR-WE. 24913."

By this receipt it shows that, if the policy of insurance did cover this loss, the said E. L. Brady Company has not been paid for the loss by the insurance company, and therefore the insurance company has not been subrogated to the rights of the E. L. Brady Company. This receipt (Exhibit C) quoted above specifically provides that the advancement of the said \$733.73 was a "loan" and "repayable." This form of receipt has been construed by numerous Federal authorities as being in the form of a loan and advancement to be recovered back, and does not subrogate the insurance company in place of the person to whom said money had been advanced or loaned. It cannot be construed as a pay-

ment for the loss. See *Bradley vs. Lehigh Valley R. R.* (D. C.) 145 Fed. 569, affirmed in 153 Fed. 350, 82 C. C. A. 426; *Inman vs. Railway Co.*, 129 U. S. 140, 9 Sup. Ct. 249, 32 L. Ed. 621; *Fayerweather vs. Phenix Ins. Co.*, 118 N. Y. 324-327, 23 N. E. 192, 6 L. R. A. 805.

In the last case cited the carrier had issued a bill of lading to the shipper, reserving to the carrier all the rights of the shipper in any policy of insurance. The policy issued by the insurance company, however, provided that the insurance company should have all the benefit of all claims of the shipper against any carrier. The policy also provided that, in case of any agreement or act by the insured whereby any right of recovery by the insured against any carrier is released, the insurance company should not be bound to pay the loss, and the court said:—

“This action is prosecuted by the assured owners to recover from the insurer their loss so sustained; and it is defended on the ground that the owners violated the provision of the contract of insurance.”

At page 329 of 118 N. Y., page 193 of 23 N. E. (6 L. R. A. 805), the court further said:—

“The plaintiffs in this action expressly stipulated that they would make no agreement, nor do any act whereby their right of action against the carrier * * * should be released or cut off. * * * By the contract entered into between the plaintiffs and the carrier, the rights stipulated for by the insurer have been wholly nullified and cut off, which defeats the plaintiff's right to recover on the policy” (citing *Carstairs vs. Mechanics & Traders' Ins. Co.*, 18 Fed. 473).

The court further said:—

“When goods in the hands of a common carrier for transportation are insured by the owner, and are subsequently lost or injured under circumstances rendering the carrier liable to the owner for the damages and the insurer pays the loss to the owner, the insurer, in the absence of stipulations between the carrier and owner defeating the right, is entitled to be subrogated to the rights and remedies of the owner against the carrier. *Hall vs. Railroad Co.*, 13 Wall. 367 [20 L. Ed. 594]; *C. F. Ins. Co. vs. Erie R. R.*, 73 N. Y. 399 [29 Am. Rep. 171]; *Sheld*, on Sub. § 329. But the struggle between carriers and insurers to escape the liability imposed under the usual bills of lading and policies, by casting the burden of the loss upon the other by the insertion of unusual and astute provisions in their respective contracts with the owner, has rendered this simple rule of law quite inapplicable to many of the cases arising under such special contracts.”

Reverting to Exhibit C, this form of receipt has received construction in numerous authorities. In *Bradley vs. Lehigh R. R.* *Supra*, the court below, by Adams, J., said:—

“It is contended, however, that the transactions between the

cargo owners and their insurers subsequent to the loss amount to a payment thereof, and the insurers are thereby estopped from claiming the benefit of the warranty in the policy. It appears that the insured presented a claim to the underwriter and advanced such amount 'as a loan,' taking a receipt showing such fact. * * * This method of dealing has been authoritatively held not to constitute a payment. The Guiding Star [D. C.] 53 Fed. 936, 940; Inman Case, 129 U. S. 128 [9 Sup. Ct. 249, 32 L. Ed. 612]; Judd vs. N. Y. Co., 117 Fed. 206, 213 [54 C. C. A. 238]; Pennsylvania R. R. vs. Burr, 130 Fed. 847 [65 C. C. A. 331]."

The case of Kalle & Co. vs. Morton, 156 App. Div. 522, 141 N. Y. Supp. 374, seems to be in point upon facts almost similar to the case at bar, wherein McLaughlin, J., in writing the opinion, said at page 524 of 156 App. Div., page 375 of 141 N. Y. Supp.:

"There is nothing in the submission to indicate that the insurance company, in advancing the \$330, intended thereby to waive any defense which it had, or that such advancement was to be considered as an unconditional payment of any liability under the policy; on the contrary, the agreement entered into between the insurance company and the shipper, at the time the money was advanced, shows that such was not its intent and it did not so elect. The money was advanced upon certain specified conditions, among which were (a) the presentation of a claim to the carrier for the amount of the loss, and (b) upon receiving payment to refund the same to the insurance company. If it be true, as indicated, that the policy could not have been enforced, then the insurance company had a right to exact such terms with respect to the carrier—that is, the party primarily liable to the insured—as it chose as a condition of payment. Inman vs. South Carolina Ry., 129 U. S. 128 [9 Sup. Ct. 249, 32 L. Ed. 612]; Bradley vs. Lehigh Valley R. R., 153 Fed. 350 [82 C. C. A. 426]. If it be conceded by the defendant, that the transaction amounted to a payment by the insurance company so as to relieve it of all liability under its policy, nevertheless it was upon terms which it had the legal right to impose. It, however, was not a payment or a waiver by the insurance company of its defense (Pennsylvania R. R. vs. Burr, 130 Fed. 847 [65 C. C. A. 331]; Southard vs. Minneapolis, St. P. & S. S. M. Ry., 60 Minn. 382 [62 N. W. 442, 619])."

Defendants cite quite a number of authorities to uphold the contention that it is in all respects subrogated to the rights of the E. L. Brady Company to the payment of this money, irrespective of the signing of Exhibit C by the said E. L. Brady Company; but from the examination of the authorities cited by the defendants, which the court has carefully read, they fail to support the contention so made by the defendants.

As to the question whether suit may be brought in the name of

the insured or his assignee, it has been held that the insurance company may bring suit in the name of the insured. *Hall vs. Railway Co.*, 13 Wall. 367-370 [20 L. Ed. 594]; *Carpenter vs. E. T. Co.*, 71 N. Y. 574-579; *Steamship Co. vs. Cooper*, 185 Fed. 733, 741, 108 C. C. A. 71. Therefore I conclude that the liability of the defendants as common carriers is established. The insurance policy did not cover the loss in question. The loss was never "paid" by the insurance company, under the authorities above stated, and the insurance company was not subrogated.

It follows that the plaintiff is entitled to judgment against the defendants for the sum of \$733.73, no part of which has been paid by the defendants, together with interest and costs. Submit judgment accordingly.

HORRIGAN CONTRACTING CO. v. COLUMBIA INS. CO.* (Superior Court of Delaware. New Castle.)

INSURANCE—PROCESS—MODE OF SERVICE.

23 Del. Laws, c. 71, § 1, provides that no foreign insurance corporation shall transact business until it shall have first appointed the insurance commissioner to be its attorney for the service of process, while section 3 declares that, whenever service of process on an insurance company may be made on the insurance commissioner, the commissioner may designate some person upon whom, in his absence, service may be made. *Held* that, as the statute expressly provided how service shall be made in the absence of the insurance commissioner, it contemplates only personal service, and service of copy on an adult in the commissioner's office is unavailing, and must be quashed.

(For other cases, see *Insurance*, Cent. Dig. §§ 1573, 1574; Dec. Dig. § 627.)

Action by the Horrigan Contracting Company, a corporation of the state of Delaware, to the use of the Gormerly-Swartz Motor Car Company, a corporation of the state of Pennsylvania, against the Columbia Insurance Company, a corporation of the state of New Jersey. On motion to quash and set aside the return of service by a copy. Motion sustained.

Argued before Pennewill, C. J., and Woolley, J.

Reuben Satterthwaite, Jr., of Wilmington, for the Motion.
John F. Neary, of Wilmington, Opposed.

* Decision rendered, Oct. 6, 1913. 89 Atl. Rep. 210.

RUST LUMBER CO. vs. GENERAL ACCIDENT, FIRE & LIFE ASSUR. CORP., LTD. (No. 19,584.)*

(Supreme Court of Louisiana.)

INSURANCE—POLICY—CONSTRUCTION.

A policy of insurance, issued to a company engaged in a business described as "saw-mill, planing mill, mill yards, kilns, sheds, woodsmen and teamsters," and insuring it, as trustee, against bodily injuries sustained by the employees of the assured, through external, violent, and accidental means, while actually engaged in operations such as are usual to the kind of trade or business so described, does not cover the risk incurred in the employment of mill hands in the boring of an artesian well for the obtention of water. It is true that the business so described presupposes the use of water and the necessity for obtaining it, but so it presupposes the use of fuel wherewith to convert the water into steam, and yet it would hardly be argued that the policy, as written, would cover the risk of mining for coal, or boring for fuel oil.

(For other cases, see Insurance, Cent. Dig. § 1144; Dec. Dig. § 435.)

Appeal from Twelfth Judicial District Court, Parish of Sabine; Don E. Sorelle, Judge.

Action by the Rust Lumber Company against the General Accident, Fire & Life Assurance Corporation, Limited. From judgment for plaintiff, defendant appeals. Reversed and dismissed.

P. M. Milner, of New Orleans, for Appellant.

S. D. Ponder, of Leesville, and R. A. Fraser, of Many, for Appellee.

* Decision rendered, Dec. 15, 1913. Rehearing denied, Jan. 19, 1914.
64 South. Rep. 122. Syllabus by the Court.



TRUAN vs. RANGE POWER CO. ET AL. (LONDON GUARANTEE & ACCIDENT CO., Garnishee).*

(Supreme Court of Minnesota.)

GARNISHMENT—INDEMNITY INSURANCE—LIABILITY OF INSURER.

A guarantee insurance company held not liable as garnishee upon a judgment against the assured on an indemnified risk, where, at the time of service of the garnishee summons and when disclosure was made, it held a valid claim for policy premiums against assured in excess of such judgment, though it defended the main action; the rule of Patterson vs. Adan, 119 Minn. 308, 138 N. W. 281, being inapplicable. (For other cases, see Garnishment, Cent. Dig. §§ 255-259; Dec. Dig. § 130.)

* Decision rendered, Jan. 16, 1914. 145 N. W. Rep. 26. Syllabus by the Court.

Appeal from District Court, St. Louis County; Martin Hughes, Judge. Action by Kate Truan against the Range Power Company and others, in which the London Guarantee & Accident Company was garnishee. From judgment for plaintiff, the garnishee appeals. Reversed.

Alexander Marshall, of Duluth, for Appellant.
Austin & Austin, of Chisholm, for Respondent.

DUNHAM *vs.* PHILADELPHIA CASUALTY CO.*

(St. Louis Court of Appeals. Missouri.)

1. INSURANCE—INDEMNITY INSURANCE—POWER OF ADJUSTER.

An adjuster of an employers' liability insurance company, sent out with power to ascertain the extent of the injuries and to settle the claim, has sufficient power to authorize the insured, whose servant was injured, to continue to provide medical services.

(For other cases, see Insurance, Dec. Dig. § 513.)

2. INSURANCE—EMPLOYERS' LIABILITY INSURANCE—CONDITIONS PRECEDENT.

Where an employer's liability policy provided that no action should lie against the company for any loss or expense unless brought by the insured to reimburse him for loss or expense paid after a trial of the issues, unless the payment shall have been made with the written consent of the company, it is a condition precedent to a recovery of expenses incurred by the insured that the payment be not made until after the trial of the issues or with the written consent of the company.

(For other cases, see Insurance, Dec. Dig. § 513.)

3. APPEAL AND ERROR—REVIEW—JUDGMENTS.

On appeal from an action tried to the court, the Appellate Court will sustain the judgment on any theory sufficiently supported by the evidence, where there are no instructions showing that the court proceeded on a different theory.

(For other cases, see Appeal and Error, Dec. Dig. § 852.)

4. INSURANCE — EMPLOYER'S LIABILITY INSURANCE — WAIVER.

In an action on an employer's liability insurance policy providing that the insurer should not be liable for payments made by the insured unless made after a trial of the issues, or with the written consent of the company, the insurer *held* to have waived that provision and rendered itself liable to reimburse the insured for payments for medical services rendered an injured employee.

(For other cases, see Insurance, Cent. Dig. § 1040; Dec. Dig. § 391.)

* Decision rendered, Dec. 31, 1913. 162 S. W. Rep. 728.

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.
Action by J. M. Dunham against the Philadelphia Casualty Company.
From a judgment for plaintiff, defendant appeals. Affirmed.

Chas. E. Morrow, of St. Louis, for Appellant.
Paul V. Janis, of St. Louis, for Respondent.

HORWITZ vs. AMERICAN SURETY CO. OF N. Y. ET AL.*
(Supreme Court of New Jersey.)

PRINCIPAL AND SURETY—BUILDING CONTRACTOR'S BOND—CONSTRUCTION.

If there be a plain repugnancy between the provisions of an original contract and those of a supplemental one between the same parties and relating to the same subject-matter, the earlier contract must yield to the later so far as the repugnancy extends.

(For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.)

Action by Portia Horwitz against the American Surety Company of New York and others. Demurrer to pleas overruled.

See, also, 83 N. J. Law, 204, 85 Atl. 219.

Argued June term, 1913, before Gummere, C. J., and Parker and Kalisch, JJ.

Louis H. Miller, of Millville, for Plaintiff.

Walter H. Bacon, of Bridgeton, for Defendants.

* Decision rendered, Dec. 27, 1913. 89 Atl. Rep. 246. Syllabus by the Court.

HARRIS *vs.* GREAT EASTERN CASUALTY CO.*
(Supreme Court of New York. Appellate Division, First Department.)

PLEADING — BILL OF PARTICULARS — RIGHT — NAMES OF CORPORATE REPRESENTATIVES.

Where in an action to reform a burglary insurance policy by including a statement to show a prior loss by plaintiff's assignor and a prior objection of a burglary insurance policy by another company, it was claimed that the policy was returned to defendant for correction, so as to show the facts sought to be incorporated in the policy by the amendments, and that defendant agreed to so amend the policy, defendant is entitled to a bill of particulars showing the names of its representatives with whom the alleged agreement was made; it appearing from a prior bill of exceptions that plaintiff can obtain such information from certain persons.

(For other cases, see Pleading, Cent. Dig. §§ 954-962; Dec. Dig. § 317.)

Appeal from Special Term, New York County.

Action by Harry Harris against the Great Eastern Casualty Company. From an order denying a motion for an additional bill of particulars, defendant appeals. Reversed, and motion granted.

Argued before Ingraham, P. J., and Clarke, Scott, Dowling, and Hotchkiss, JJ.

Joseph L. Prager, of New York City, for Appellant.
Herman M. Schaap, of New York City, for Respondent.

* Decision rendered, December 31, 1913. 144 N. Y. Supp. 950.

MARCUS ET AL. VS. FIDELITY & DEPOSIT CO. OF MD.*

(Supreme Court of New York. Appellate Term, First Department.)

INSURANCE—ACTION ON EMPLOYEE'S BOND—PROOF REQUIRED.

Where, in an action on an employee's bond, plaintiffs proved that the employee collected and failed to pay over a certain sum, and after demand therefor disappeared and was arrested only after diligent search, and defendant offered no evidence, it was error to dismiss the complaint; plaintiff's evidence being sufficient to make out a *prima facie* case of embezzlement and entitle them to recovery, in the absence of any proof contradictory thereof.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

Appeal from Municipal Court, Borough of Manhattan, First District. Action by Nathan Marcus and another against the Fidelity & Deposit Company of Maryland. From judgment for defendant, plaintiffs appeal. Reversed, and new trial ordered.

Argued December term, 1913, before Seabury, Guy, and Bijur, JJ.

Abraham Nelson, of New York City, for Appellants.
O'Brien, Boardman & Platt, of New York City (Renwick F. H. Macdonald, of New York City, of counsel), for Respondent.

* Decision rendered, Dec. 30, 1913. 145 N. Y. Supp. 49.

LEGLER ET AL. *vs.* UNITED STATES FIDELITY & GUARANTY CO.*

(Supreme Court of Ohio.)

1. CONTRACTS—CONSTRUCTION.

All the provisions of a contract must be construed together, in determining the meaning of any particular clause thereof.

(For other cases, see Contracts, Cent. Dig. §§ 742, 743; Dec. Dig. § 161.)

2. INSURANCE—BREACH OF WARRANTY OR CONDITION—EMPLOYEE'S INDEMNITY BOND—CONSTRUCTION.

In an action on an employee's indemnity bond, providing that "this bond is issued on the express understanding that the employee has not within the knowledge of the employer at any former time been a defaulter," it was no defense that the employee had previously been a defaulter, where the employer had no knowledge thereof, though it was provided in a preceding clause of the bond that, "if the employer's written statements heretofore referred to shall be found in any respects untrue, this bond shall be void."

(For other cases, see Insurance, Cent. Dig. § 657; Dec. Dig. § 285.)

Error to the Circuit Court of Montgomery County.

Action by one Legler, administrator, and others against the United States Fidelity & Guaranty Company. A judgment of the common pleas court sustaining demurrer to reply and amendment thereto was affirmed by the Circuit Court, and plaintiffs bring error.

Reversed and remanded, with directions.

D. B. Van Pelt and McConnaughey & Shea, all of Dayton, for Plaintiff in Error.

Matthews, James & Matthews, of Dayton, for Defendant in Error.

* Decision rendered, May 13, 1913. 103 N. E. Rep. 897.

LIFE.

UNITED STATES CIRCUIT COURT OF APPEALS.
SEVENTH CIRCUIT.

IN RE CHURCHILL.

CHURCHILL ET AL.

vs.

BESTUL*

1. BANKRUPTCY—EXEMPTIONS—LIFE POLICY—RIGHT OF BENEFICIARY.

Where a life insurance policy was payable, in case of insured's death, to his wife, or if the insured was living at the end of twenty years he might elect to receive certain specified valuable benefits, insured, on becoming a bankrupt before the end of such period, was without right or power either to deprive his wife of the life insurance provision then existing in her favor or to obtain any benefits thereunder by surrender or by other arrangements to which she did not expressly assent.

(For other cases, see Bankruptcy, Cent. Dig. §§ 659-668; Dec. Dig. § 396.)

2. BANKRUPTCY—LIFE POLICY—RIGHT OF BENEFICIARY.

Where a life insurance policy insured a husband for the benefit of his wife her rights as beneficiary are exempt from interference or control by him, both under the general law and by St. Wis. 1898, § 2347.

(For other cases, see Bankruptcy, Cent. Dig. §§ 659-668; Dec. Dig. § 396.)

3. BANKRUPTCY—LIFE INSURANCE POLICY—RIGHTS OF TRUSTEE.

Bankr. Act July 1, 1898, c. 541, § 70a; 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), vests in the bankrupt's trustee property which prior to filing of the petition the bankrupt by any means could have transferred, or which might have been levied on and sold under judicial process against him, provided that when any bankrupt shall have any insurance policy, which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so stated and continue to carry the policy. Held, that such section only applied to policies held by the bankrupt which have a cash surrender value, and hence where a policy on the bankrupt's life was payable to his wife on death before the end of twenty years, but had no surrender value when insured was adjudged a bankrupt prior to the end of such period, the fact that it also provided certain valuable optional benefits, which the bankrupt might avail himself of in case he survived the period, did not confer on the bankrupt's trustee any rights in the policy under such section.

(For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.)

* Decision rendered, October 7, 1913. 209 Fed. Rep. 766.

Petition to review and revise order of the District Court of the United States for the Eastern District of Wisconsin; Ferdinand A. Geiger, Judge.

Bankruptcy proceedings of Charles Churchill. On petition by the bankrupt and his wife to review and revise in matters of law an order (1908 ed. 711) adjudging rights in favor of R. J. Bestul, the bankrupt's trustee, under an insurance policy on the life of the bankrupt. Order reversed, with directions.

This is a petition by the bankrupt and his wife for review and revision of an order in bankruptcy of the United States District Court for the Eastern District of Wisconsin, adjudicating rights in favor of the trustee under an insurance policy upon the life of the bankrupt.

The instrument in controversy is written by New York Life Insurance Company, bearing date December 20, 1892, and is variously named therein "insurance policy," "guaranteed interest bond," and "bond policy." It provides for annual premiums of \$189.80 to be paid "every year until ten full years' premium shall have been paid," and thereupon the insurance company "promises and agrees" on the face of the policy:—

"First. That upon receipt and approval of proofs of the death, during the continuance of this policy of Chas. Churchill of Waupaca, county of Waupaca, state of Wisconsin (hereinafter called the insured), it will pay the amount of two thousand dollars, at its office in the city of New York, to Ann E., wife of the insured, or, in the event of her prior death, to the insured's executors, administrators or assigns.

"Second. That if this bond policy shall become payable in consequence of such death, occurring before the eighth day of December, nineteen hundred and twelve, and if the total amount of annual premiums paid, with interest compounded at the rate of 4 per cent per annum from the date of each payment to the date of death, shall exceed the face amount of the bond policy, the company will pay the amount of the difference between the face of the bond policy and the said amount so computed, as a mortuary dividend.

"The benefits, provisions and requirements, placed by the company on the back hereof, are a part of this contract, as fully as if recited over the signature hereto affixed."

The provisions referred to "on the back" of the policy, in so far as involved in the controversy, read as follows:—

"Optional Benefits.

"If the insured is living on the 8th day of December in the year nineteen hundred and twelve, and if this bond policy is then in force, the premiums having been paid in full to that date, the insured shall be entitled to one of the following benefits:—

"1. The continuance of this bond policy, which then becomes a paid-up insurance, payable at the death of the insured: To-

gether with an annual income during the life of the insured of eighty dollars and . . . cents per annum (being equal to 4 per cent of the total amount of annual premiums paid), the first payment of said income to be made the said insured, if living, on the 8th day of December, nineteen hundred and thirteen, and an equal payment to be made annually thereafter, provided the said insured shall be living when such annual payment becomes due; and, in addition, the conversion of the surplus then apportioned by the company to this bond policy into a life annuity, payable together with the income above guaranteed.

"2. The continuance of this bond policy, guaranteeing a paid-up insurance and an annual income as specified in benefit '1,' and the withdrawal in cash of the above-defined surplus.

"3. The surrender of the bond policy to the company for its cash value, which is hereby guaranteed shall not be less than two thousand dollars, and which shall in addition to that amount include the above-defined surplus.

"4. The surrender of this bond policy, and the conversion of its cash value, as above defined, into an annual income during the life of the insured, payable in like manner as provided in benefit '1,' it being guaranteed that the annual amount of such income shall not be less than two hundred and forty-nine dollars and ten cents.

"Provided, however, that the insured shall notify the company, in writing, not less than three months before the first-named date above, which privilege is selected, and that in default of such notice, benefit '1' shall be considered selected..

"Dividends.

"No dividends of surplus shall be allowed or paid upon this bond policy to the date specified above, at which it becomes entitled to one of the above benefits. If this bond policy is continued under benefit '1,' or '2,' it shall participate annually thereafter in any dividend declared by the company on its paid-up policies, and the cash value allowed for any such dividends shall be payable together with the income payments hereinabove provided for."

On September 15, 1910, the insured, Charles Churchill, was adjudged a bankrupt, on his voluntary petition, all premiums on the above-mentioned policy having been paid up in conformity with its terms. Subsequently the bankrupt joined with his wife in a petition thereunder, for exemption of the above-mentioned policy from any claim asserted by the trustee in bankruptcy and to have established in such petitioners "all right, title and interest" therein. On hearing thereof, the referee ruled against the petitioners, in substance: That the trustee in bankruptcy was entitled thereto; that the policy had a cash surrender value of \$1,860, at the date of the bankruptcy adjudication; that unless such amount was paid by the bankrupt to the trustee within thirty days, the policy must be delivered over to the trustee for the benefit of the estate. The order made by the referee accordingly was affirmed by the dis-

trict court, on certification of the proceedings for review. Fed. 711.

Before Baker, Seaman, and Kohlsaat, Circuit Judges.

Peter Fisher, of Kenosha, Wis., for Petitioners.
Lloyd D. Smith, of Waupaca, Wis., for Respondent.

SEAMAN, C. J. (after stating the facts as above). In the bankruptcy proceeding below, the bankrupt and his wife claimed all benefits provided under the life insurance policy in controversy, free from property rights therein asserted on the part of the trustee in bankruptcy. Their petition to that end was denied by the district court, through an adjudication (in effect) that the estate in bankruptcy was entitled to all the benefits of such policy, unless the bankrupt paid over to the trustee, within thirty days, the sum of \$1,860, stated in the order as "the cash surrender value of said insurance policy." Review and revision of such order is sought by the petitioners, under their original petition before this court, the trustee's answer, and the certified record.

The issue of law thus presented is whether the provisions of the Bankruptcy Act authorize the ruling below that the trustee became entitled to the benefits of the policy in evidence. However difficult of solution that inquiry may be, it is not free from complications of fact, but it neither appears nor is asserted that any terms of the policy applicable to the issue are uncertain or their meaning.

The policy was issued to Charles Churchill, as the insured, in 1892. It required all the premiums to be paid during the first two years ensuing, and they were so paid, making the contract one of "paid-up insurance" long prior to September 15, 1910, the date of adjudication of the insured as a bankrupt. Its provisions which were operative at the last-mentioned date and at all times up to December 8, 1912, were those contained on the face of the policy whereby his wife, then living, was made sole beneficiary in the event of death of the insured; and while its subsequent terms made operative only after the expiration of twenty years from the date—to be considered later—provide optional benefits in favor of the bankrupt, which include surrender of the policy "for cash value" as one of the options, it is both obvious, from examination of the entire policy and conceded by the parties, that neither surrender by the insured nor cash surrender value thereof at any period prior to December 8, 1912, was provided by the contract terms. At the stage, therefore, when bankruptcy intervened, the wife was made the sole beneficiary, throughout the above-mentioned period, of the life insurance secured by the policy. Subsequent provisions, however, confer in substance the following:

"optional benefits" in favor of the insured, if "living on the 8th of December," 1912, namely: (1) Continuance of the policy as "a paid-up insurance, payable at the death of the insured," together with an annual income of \$80 during his life, and further conversion of the surplus apportioned to the policy "into a life annuity." (2) Continuance of the policy, "guaranteeing a paid-up insurance and an annual income" as above specified, and "withdrawal in cash of the above-defined surplus." (3) Surrender of the policy "for its cash value," to be not less than \$2,000 and in addition thereto "included the above-defined surplus." (4) Surrender of the policy and conversion of its cash value "into an annual income during the life of the insured," payable as described, to be not less than \$249.10. The insured is required to give written notice to the company "not less than three months" prior to the above date "which privilege is selected," and in default thereof "benefit 1 shall be considered selected." No "dividends of surplus shall be allowed or paid" on the policy, prior to the date "at which it becomes entitled to one of the above benefits." If the policy is continued under benefits 1 or 2, "it shall participate annually thereafter in any dividend declared" on paid-up policies, to be paid with the income payments.

[1] Valuable benefits are thus secured in favor of the bankrupt, contingent on his surviving the twenty-year period; but we are of opinion that the bankrupt was without right or power, when the adjudication of bankruptcy occurred, either to deprive his wife of the life insurance provision then existing in her favor, or to obtain any benefits thereunder, through surrender or other arrangement not expressly authorized by the wife.

[2] In reference to such interest of the wife, the law is well settled that her rights as beneficiary of life insurance are exempt from interference or control on the part of the insured husband—both under the general rule (*Central Bank of Washington vs. Hume*, 128 U. S. 195, 203, 206, 9 Sup. Ct. 41, 32 L. Ed 370.), and pursuant to the Wisconsin Statute (section 2347, Wis. Stat. 1898) applicable thereto.

[3] Thus the issue is presented whether the above-mentioned prospective "optional benefits" in favor of the bankrupt constitute property which passes to the trustee within the meaning of the Bankruptcy Act. It arises irrespective of the alleged error in overruling the petitioners' contention that all benefits under the policy were exempt by the statutes of Wisconsin (Wis. Stat. 1898, sub-div. 19, § 2982, and section 2347) from claim on the part of creditors—an issue discussed in the opinion below and in the arguments of counsel herein, which may not be free from difficulty, under the Wisconsin authorities called to attention, whenever its solution becomes needful.

The order of the referee, on the hearing before him, appears to treat the policy as falling within the proviso of section 70a of the

Bankruptcy Act, as an insurance policy held by the bankrupt "which has a cash surrender value payable to himself, his estate or personal representatives." It undertakes to ascertain and fix such value, at the date of adjudication in a bankruptcy, to be \$1,860, and that the "insurance policy belonged to and should be taken possession of by" the trustee in bankruptcy, unless the bankrupt paid to him "the cash surrender value" thereof thus stated. We understand, however, from the opinion filed by the district judge, that this view was disapproved, and that the ruling against the petitioners, on the issue under consideration, rested on the proposition that the policy, having no cash surrender value, must nevertheless "be treated as property of the bankrupt passing to the trustee." In other words, that the trustee derives title under the terms of section 70a immediately preceding the proviso, which reads:—

"Property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him."

We are impressed with no doubt that the ruling of the referee was erroneous in its application of the above-mentioned proviso to this policy. Not only was surrender thereof by the bankrupt unauthorized and no cash surrender value provided by the policy terms, when bankruptcy intervened, but the letter on the part of the insurance company, which appears to have been accepted as proof of such authorization and surrender value, was plainly without force to that end, if assumed to be admissible for any purpose. It merely purports to state the view of the "Actuary's Department" that "if the company had allowed a cash surrender value for this policy on September 15, 1910, the amount of such cash value would have been \$1,860," without even an intimation that any sum was then available to the bankrupt under rule or custom of the insurer. Moreover, another letter on the part of the company (also in the record) expressly states:—

"The company does not pay a cash surrender or loan value for any of its policies except for such policies as provided for those values."

Thus the order must be predicated alone on the further contention above mentioned that the policy, having no cash surrender value in favor of the bankrupt, passes to the trustee under the general clause of the act referred to.

Is that interpretation tenable, in the light of the recent decisions of the Supreme Court, in three cases—*Burlingham et al., Trustees, vs. Crouse*, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920; *Everett, Trustee, vs. Judson*, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927; *Andrews vs. Partridge, Trustee*, 228 U. S. 479, 33 Sup. Ct. 570, 57 L. Ed. 929—handed down April 28, 1913? That sanction appeared therefor in the line of authorities cited in the opinion below—including the pertinent opinion of this court,

speaking through Judge Jenkins, in *Re Welling*, 113 Fed. 189, 191, 51 C. C. A. 151—cannot be doubted; but if these interpretations of the act are inconsistent with the above-mentioned decisions of the ultimate authority, it is obvious that neither of such citations lends support to the order in the present case.

In *Burlingham et al., Trustees, vs. Crouse*, the ruling of the Circuit Court of Appeals for the Second Circuit (181 Fed. 479, 104 C. C. A. 227) against the claim of a trustee in bankruptcy that he was entitled to the benefits of two policies outstanding upon the life of one of the bankrupts was affirmed. The policies were written by the Equitable Life Assurance Society, April 10, 1902, upon the life of Thomas A. McIntyre, and are thus described in the opinion:—

"They were known as 'guaranteed cash-value, limited-payment, life policies,' each providing that upon the death of the insured the company would pay to his executors, administrators or assigns the sum of \$100,000 in fifty annual installments, or the sum of \$53,000 in cash, a total of \$106,000 for the two policies."

On April 14, 1906, the policies were assigned by the insured to his firm, T. A. McIntyre & Co., subsequently adjudicated bankrupt, both individually and as a copartnership; and the firm assigned the policies to the insurer on April 24, 1907, "as collateral security for a loan of \$15,370." On February 25, 1908, two months prior to the proceedings in bankruptcy, the firm assigned the policies to one Crouse, subject to the prior assignment as security. On April 25, 1908, the proceedings in bankruptcy were instituted and the adjudication occurred May 21, 1908; the assignee Crouse having paid the premiums accrued on the policies, \$6,078.38. The trustees in bankruptcy were elected July 24, 1908, and the insured, McIntyre, died July 29, 1908, so that the policies then became payable, and the insurer paid into court the proceeds thereof, less the amount of its loan, making the payment \$90,698.32. It is stated in the opinion that the policies had a cash surrender value of \$15,370 "when the trustees qualified," which was the amount of the above-mentioned loan thereon; but their suit to recover the excess was predicated on the contention that the bankrupt firm was vested with a transferable property right in the policies, far in excess of the loan, and that the transfer to Crouse constituted an unlawful preference under the terms of the Bankruptcy Act. Conceding that a valuable and transferable property interest of the firm was thus assigned, the Circuit Court of Appeals "held that under the circumstances the policies did not pass to the trustees as assets," so that the action to set aside the transfer to Crouse as a preference "could not be maintained."

We believe the rulings of the Supreme Court upon the issue thus presented are decisive of the instant inquiry. The opinion of Mr. Justice Day remarks, that "the correctness of this decision depends primarily upon the construction of section 70a of the

Bankruptcy Act," with subdivision 5 as the special provision involved for interpretation. It refers to the general terms of the subdivision vesting in the trustee transferable property, followed by "the proviso with reference to insurance policies which have a cash surrender value," and then states:—

"Two constructions have been given this section, and the question, as presented in this case, has not been the subject of direct determination in this court. The one favors the view that only policies having a cash surrender value are intended to pass to the trustee for the benefit of creditors. The other, conceding that the proviso deals with this class of policies, maintains that policies of life insurance which have no surrender value pass to the trustee under the language of section 70a immediately preceding the proviso, which reads: 'Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.' "

The cases upholding these views respectively are cited, including *In re Welling*, *supra*, *In re Orear*, 178 Fed. 632, 102 C. C. A. 78, 30 L. R. A. (N. S.) 990, and other authorities for the last-mentioned view, and the opinion proceeds:—

"To determine the congressional intent in this respect requires a brief consideration of the nature of the rights dealt with. Life insurance may be given in a contract providing simply for payment of premiums on a calculated basis which accumulates no surplus for the holder. Such insurance has no surrender value. Policies, whether payable at the end of a term of years or at death, may be issued upon a basis of calculation which accumulates a net reserve in favor of the policyholder and which forms a consequent basis for the surrender of the policy by the insured with advantage to the company upon the payment of a part of this accumulated reserve. This feature of surrender value was discussed by Judge Brown of the Southern district of New York, in *Re McKinney* [D. C.] 15 Fed. 535, 537," quoted thereupon.

After review of the earlier rulings in *Holden vs. Stratton*, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018, and *Hiscock vs. Mertens*, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, the opinion mentions the fact that in the *Hiscock* Case the surrender value of the policies appeared to be less than \$6,000 at the date of bankruptcy, whereas, shortly thereafter "the maturity of one of the policies would give it a value of over \$11,000," but that it was held "that this circumstance made no difference in the right of the insured to pay the surrender value and hold the policy." Its interpretation of the act, which we believed applicable here, is then stated:—

"True it is that life insurance policies are a species of property and might be held to pass under the general terms of subdivision 5, § 70a; but a proviso dealing with a class of this property was

inserted and must be given its due weight in construing the statute. It is also true that a proviso may sometimes mean simply additional legislation, and not be intended to have the usual and primary office of a proviso which is to limit generalities and exclude from the scope of the statute that which would otherwise be within its terms.

"This proviso deals with explicitness with the subject of life insurance held by the bankrupt which has a surrender value.

Originally life insurance policies were contracts in consideration of annual sums paid as premiums for the payment of a fixed sum on the death of the insured. It is true that such contracts have been very varied in form since, and policies payable in a period of years so as to become investments and means of money saving are in common use. But most of these policies will be found to have either a stipulated surrender value or an established value, the amount of which the companies are willing to pay and which brings the policy within the terms of the proviso (*Hiscock vs. Mertens, supra*) and makes its present value available to the bankrupt estate. While life insurance is property, it is peculiar property. Legislatures of some of the states have provided that policies of insurance shall be exempt from liability for debt, and in many states provision is made for the protection from such liability of policies in favor of those dependent upon the insured. See *Holden vs. Stratton, supra*.

"Congress undoubtedly had the nature of insurance contracts in mind in passing section 70a with its proviso. Ordinarily the keeping up of insurance of either class would require the payment of premiums perhaps for a number of years. For this purpose the estate might or might not have funds, or the payments might be so deferred as to unduly embarrass the settlement of the estate. Congress recognized also that many policies at the time of bankruptcy might have a very considerable present value which a bankrupt could realize by surrendering his policy to the company. We think it was this latter sum that the act intended to secure to creditors by requiring its payment to the trustee as a condition of keeping the policy alive. In passing this statute Congress intended, while exacting this much, that when that sum was realized to the estate the bankrupt should be permitted to retain the insurance which, because of advancing years or declining health, it might be impossible for him to replace. It is the twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors and then to give the bankrupt a fresh start with such exemptions and right as the statute left untouched. In the light of this policy the act must be construed. We think it was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a

cash asset, otherwise to leave the insured the benefit of his life insurance."

The opinion above described was attended by two others, involving like issues under the act and further exemplification of the construction there adopted: (1) In Everett, Trustee, vs. Judson, on certiorari to the same court, its ruling (192 Fed. 834, 113 C. C. A. 158) in favor of the executor of the estate of the insured bankrupt was affirmed. Involuntary proceedings in bankruptcy were pending against the insured and his copartners in business when the insured committed suicide; the adjudication of bankruptcy against the firm occurring, not only after the appearance of the insured therein, but five days subsequent to his death. He owned three life insurance policies aggregating \$16,000, made payable to his estate, having cash surrender values respectively, subject to loans thereon which left a small excess over such value, aggregating \$68.80, when the petition in bankruptcy was filed. After the death of the insured the insurance companies paid to the trustee (under agreement) \$8,675.14 upon the policies, and the issue arose over claim of the trustee to the entire proceeds and claim of title thereto by the executor of the deceased, less the above-mentioned residue of cash surrender value. The opinion thereupon, referring to the Burlingham Case, states that "the principles therein laid down are controlling," but that the instant case has a "feature not directly involved" in that case, as the death of the insured (by suicide) occurred prior to the adjudication of bankruptcy. Its interpretation, in that view, of the various provisions of the act as fixing the line of cleavage, so that "the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition," and ruling thereupon for affirmance of the order in favor of the executor's claim, leave no room, as we believe, for support of the order in favor of the trustee in the case at bar. (2) The other case of Andrews, Executor, vs. Partridge, Trustee, reached the Supreme Court, through writ of certiorari to the Circuit Court of Appeals for the Third Circuit. It involved, in substance, like issue with that presented in the Burlingham Case, but the ruling of the Circuit Court of Appeals awarded the net proceeds of the insurance policies in controversy to the trustee in bankruptcy. 191 Fed. 325, 112 C. C. A. 69, 41 L. R. A. (N. S.) 123. This judgment was reversed as inconsistent with "the principles laid down" in each of the foregoing cases.

We are of opinion, therefore, that the order in the case at bar is inconsistent with the doctrine thus settled by the Supreme Court, and that the petitioners are entitled to the benefits of the policy in controversy. The contention that the policy is not one of life insurance, within the meaning and effect of the proviso as above construed, because of the several options open to the in-

sured after the expiration of twenty years, we believe to be untenable. Not only were the operative terms, at the date of bankruptcy, purely life insurance for the benefit of the wife, but we understand the policy, as an entirety, to be well recognized—both generally and in the above quotations from the Burlingham Case—as within the class of property embraced in the benefits of the proviso. Policies providing like optional benefits were directly involved in Holden vs. Stratton, ante, and Hiscock vs. Mertens (cited with approval in the Burlingham Case), and in each the application of the proviso to such policies was expressly upheld. See *In re Welling*, wherein like form of policy was involved. In reference to the several Wisconsin authorities, cited for and against this contention on behalf of the trustee, it is sufficient to remark that their definitions of life insurance policies relate alone to exemptions thereof provided by the state statute, so that their import can have no bearing upon the present inquiry, although of undoubtedly importance whenever an issue arises of exemption within such statutes.

In conformity with the foregoing view of the interpretation thus adopted by the ultimate authority, the order of the district court is reversed, with direction to grant relief sought by the petitioners.



COURT OF APPEALS OF KENTUCKY.

SMITH

vs.

COMMONWEALTH LIFE INS. CO.*

1. INSURANCE — LIFE INSURANCE — AGENT — DELIVERY OF POLICY.

A local agent of an insurance company, who receives a policy to transmit it to the insured and collect the premium is not an agent of the insured.

(For other cases, see *Insurance*, Cent. Dig. §§ 219-230; Dec. Dig. § 136.)

2. INSURANCE—LIFE INSURANCE—LIABILITY OF INSURER —DELIVERY OF POLICY.

Where a life policy provided that the insurance should become valid only by payment of the first premium during the life and health of the insured, and that no obligation was assumed by the company prior to the date and delivery of the policy, nor unless on that day the insured was alive and in good health, the insurance did not become effective upon the payment of the premium and the delivery of the

* Decision rendered, Jan. 27, 1914. 162 S. W. Rep. 779.

policy to the insurer's agent, where the insured died before the policy was delivered to him.

(For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.)

Appeal from Circuit Court, McCracken County.

Action by Lena Smith against the Commonwealth Life Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

J. F. Nicholson and Hazelip & Kahn, both of Paducah, for Appellant.

Wheeler & Hughes, of Paducah, for Appellee.

CLAY, C.

The defendant, Commonwealth Life Insurance Company, issued to Elvis Wallace a policy insuring his life in the sum of \$300 in favor of his sister, Lena Wallace, now Lena Smith. The policy is dated October 16, 1911. Payment being refused, the plaintiff and beneficiary, Lena Smith, brought this action against defendant to recover thereon. Plaintiff avers in her petition that the insured, Elvis Wallace, died from drowning on the night of October 16, 1911, and that he was in good health and alive when the policy was issued and delivered. She further alleged that the premium of fifteen cents for the week of October 16, 1911, had been paid, and there was due during that year a balance of \$7.65. Claiming that defendant was indebted to her in the sum of \$300, less \$7.65, she asked judgment for the balance, amounting to \$292.35, with interest. The insurance company defended on the ground that the policy had never been delivered to the insured, and that the first week's premium had never been paid. At the conclusion of plaintiff's evidence the trial court directed a verdict in favor of the defendant. Plaintiff appeals.

Plaintiff testified that defendant's agent came to her house on Tuesday morning, October 17th. He stated to her that her brother's policy had come and he could not find her brother. He further stated that he tried to deliver it all day Saturday and Monday, but could not find him. She told the agent that she had the money to pay on the policy, and he could deliver it to her. This the agent declined to do. At that time she did not know that her brother had been drowned. She saw the agent again on the following Saturday and he refused to deliver the policy. She admitted, however, that she never saw the agent until after her brother was drowned. Her brother was in good health on Monday, October 16th.

Mr. Pace, defendant's agent at Paducah, testified that the policy in question was delivered to him. On Monday morning he carried the policy around with him. He collected at the house where the sister of the insured lived. The insured was not there. On being asked if the premium was paid, he answered, "Well, yes, I suppose the premium was paid." He further stated that it was the rule of the company to take the first premium out of the agent's salary.

It was paid in this way. He was not reimbursed by the insured, nor did any one else repay him. Nor did the company ever return the fifteen cents. The policy, which was admitted in evidence, contains the following provision:—

"The insurance provided for in this policy is based on the payment, in advance, of fifty-two weekly premiums for the first year, and becomes valid only by payment of the first premium, during the lifetime and good health of the insured, provided, however, that no obligation is assumed by the company prior to the date and delivery of this policy, nor unless, on said date, the insured is alive and in sound health."

[1, 2] We refrain from discussing the question of the payment of the first premium, since, in our opinion, that question is not material to a proper determination of the case. This is not a case where a binding contract of insurance is consummated by the unconditional acceptance of an application, or otherwise, before the issue or delivery of the policy. New York Life Ins. Co. vs. Babcock, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134. No question of waiver is presented; nor is it a case where a broker representing the insured obtains through the agent of the company a policy of insurance which was delivered by the agent to the broker prior to the death of the insured. New York Mutual Life Ins. Co. vs. Thomson, 94 Ky. 253, 22 S. W. 87, 14 Ky. Law Rep. 300. By the express terms of the policy the company incurred no obligation unless the policy was delivered while the insured was alive. Defendant's local agent was not the agent or broker of the insured. The delivery of the policy to him was not a delivery to the insured. The local agent never delivered the policy to the insured, or to any one for him, prior to the death of the insured. Indeed, the policy was never delivered at all. That being true, the contract never became binding on the defendant. Commonwealth Life Ins. Co. vs. Davis, 136 Ky. 339, 124 S. W. 345; McGregor vs. Metropolitan Life Ins. Co., 143 Ky. 494, 136 S. W. 889.

Judgment affirmed.

SUPREME COURT OF NEW YORK.
APPELLATE TERM. FIRST DEPARTMENT.

JACOBS

vs.

STRUHWASSER.*

1. INSURANCE—LIFE POLICY—VESTED INTEREST OF BENEFICIARY.

Where a husband insures his life for the benefit of his wife by an ordinary life policy, the property in the policy vests at once in the beneficiary.

(For other cases see Insurance, Cent. Dig. § 1470; Dec. Dig. § 586.)

2. INSURANCE—LIFE POLICY—VESTED INTEREST OF BENEFICIARY.

Where the interest of the beneficiary in a life policy is not vested, but the insured reserves the right to change the beneficiary without her consent, the property in the policy is in the insured and liable for his debts.

(For other cases, see Insurance, Cent. Dig. § 1469; Dec. Dig. § 587.)

3. EXECUTION — SUPPLEMENTARY PROCEEDINGS — EVIDENCE.

Where, in a supplementary prosecution to punish a debtor for violation of an injunction restraining him from disposing of his property, the only evidence as to the terms of an insurance policy was the statement of the insurance agent, not purporting to be a quotation from the policy, that the policy was payable to the debtor with the wife as beneficiary with the right of a debtor to change the beneficiary without her consent, it was insufficient to show that the policy was not the usual one in which the right of the beneficiary is vested.

(For other cases, see Execution, Cent. Dig. § 1201; Dec. Dig. § 418.)

Appeal from City Court of New York, Special Term.

Proceedings supplementary to execution by William Jacobs, judgment creditor, against Herman Strumwasser, judgment debtor. From an order finding defendant guilty of contempt, he appeals. Reversed.

Argued January term, 1914, before Lehman, Page, and Bijur, JJ.

Wesselman & Kraus, of New York City (Bertram L. Kraus, of New York City, of counsel), for Appellant.

Isadore Apfel, of New York City (C. Bertram Plante, of New York City, of counsel!), for Respondent.

PAGE, J.

The judgment debtor testified upon his examination in supplementary proceedings that he was carrying a \$10,000 life insurance policy with the Northwestern Insurance Company. In support of the motion to punish him for contempt was read the affi-

* Decision rendered, Jan. 16, 1914. 145 N. Y. Supp. 916.

davit of the office superintendent of the New York agency of the said insurance company, which states that on May 20, 1913, the debtor and his wife, who was the beneficiary under the policy, jointly applied for and received a loan of \$675 upon the policy, a check for which amount was sent to the debtor on May 22, 1913, payable to himself and beneficiary, and that the policy in question was payable to the debtor's wife, Jennie Strumwasser, with right to the insured to change the beneficiary without the beneficiary's consent. In opposition to the motion were submitted the affidavits of the debtor and his wife that when the policy was first issued in 1906 it was assigned, transferred, and delivered to the beneficiary, the debtor's wife, and has ever since been in her possession, and that the loan upon the policy was obtained for the debtor's wife, and she received all the proceeds thereof.

[1, 2] The principal question to be determined is whether or not the policy was the property of the debtor and liable for his debts. It is well-established law that, where a husband insures his life for the benefit of his wife by an ordinary life policy, the property in the policy vests at once in the beneficiary (*Whitehead vs. N. Y. Life Ins. Co.*, 102 N. Y. 143, 6 N. E. 267, 55 Am. Rep. 787), and it cannot be reached by creditors of the husband (*Baron vs. Brummer*, 100 N. Y. 372, 3 N. E. 474; *N. Y. Domestic Relations Law*, § 52). Provided there are no specific provisions contained in the present policy to take it out of the operation of this rule, it is clear that the property upon which the debtor and his wife obtained the loan was exempt from execution and not within the terms of the injunction, and no fine for contempt could be predicated upon the acts committed. It is claimed, however, upon authority of *In re Wolf* (D. C.) 21 Am. Bankr. Rep. 452, 165 Fed. 984, and *Matter of White*, 23 Am. Bankr. Rep. 90, 174 Fed. 333, 98 C. C. A. 205, 26 L. R. A. (N. S.) 451, that, because the policy here in question contained a provision that the beneficiary could be changed by the insured without the consent of the present beneficiary, there was no vested interest in the wife, and the policy was still within the debtor's control and subject to his debts. Had there been any competent evidence before the learned justice at special term as to the terms of the policy and the existence of the debtor's right to change the beneficiary at will, it might possibly have brought the case within the rules established by the cases relied upon, namely, that where the interest of the beneficiary is not vested the policy is not payable absolutely to the wife and is within the husband's control and liable for his debts; but the policy has not been in evidence, and no competent proof of its terms has been adduced. The only evidence of the terms of the policy is the statement contained in the affidavit of the insurance agent that "the policy in question is payable to Jennie, his wife, with right to change the beneficiary without said beneficiary's consent." This statement does not purport to be a quotation from the policy and is nothing

more than a conclusion on the part of the deponent. It is impossible to determine from the evidence that the policy is not the usual one in which the right of the beneficiary is vested. For this reason I am constrained to hold that there was not sufficient competent evidence of the commission by the debtor of a violation of the injunction to sustain the order appealed from.

[3] There is also another ground upon which the order must be reversed. Both the debtor and his wife have sworn to the fact that in 1906 the policy was transferred and delivered to the wife, who was the sole beneficiary, and has ever since been in her possession. This in itself vested the whole property in the policy in the donee and divested any right which the husband may have had by the terms of the policy to change the beneficiary. McGlynn vs. Curry, 82 App. Div. 431, 81 N. Y. Supp. 855. The property in question was therefore not property of the debtor, and he was guilty of no contempt in joining with his wife in obtaining the loan for her benefit.

The order appealed from must be reversed, with \$10 costs and disbursements to be applied upon the judgment. All concur.

SUPREME COURT OF NEW YORK.
APPELLATE TERM. FIRST DEPARTMENT.

WACHTEL

vs.

HARRISON.*

1. INSURANCE — LIFE INSURANCE — CHANGE OF BENEFICIARIES.

A clause in an industrial life policy that a production by the company of the policy and a receipt for the sum assured signed by an executor, husband, blood relative, or lawful beneficiary of the deceased shall be conclusive evidence of payment to the person lawfully entitled, would not affect the rights of the beneficiary named in the policy or permit a change of the beneficiary without the consent of the original beneficiary.

(For other cases, see Insurance, Cent. Dig. §§ 1461-1468; Dec. Dig. § 585.)

2. INSURANCE — LIFE INSURANCE — CHANGE OF BENEFICIARIES.

A paper signed by decedent purporting to change the beneficiary in an industrial life policy would not have that effect if it was not con-

* Decision rendered, Feb. 13, 1914. 145 N. Y. Supp. 989.

sented to by the original beneficiary where the policy did not provide for change of beneficiaries without the beneficiary's consent.
(For other cases see Insurance, Cent. Dig. § 1469; Dec. Dig. § 587.)

Appeal from Municipal Court, Borough of Manhattan, Second District.

Action by Gertrude Wachtel against the Metropolitan Insurance Company, on a policy, in which the company interpledged Joseph Harrison. From a part of a judgment directing that the proceeds of a life insurance policy be paid to plaintiff, Harrison appeals. Reversed, and new trial ordered.

Argued January term, 1914, before Lehman, Page, and Bijur, JJ.

Emanuel Celler, of New York City, for Appellant.
Louis Levene, of New York City, for Respondent.

PAGE, J.

The plaintiff sued the insurance company upon three separate policies of insurance upon the life of Mary Harrison, deceased. The defendant Joseph Harrison made a demand upon the company for payment of the amount due upon the policies and was by order of the court interpledged, and the action was contested between him and the plaintiff; the insurance company having paid the amount due into court. Judgment was granted for the plaintiff for the full amount with costs, and this appeal is taken from the part of the judgment which directs the amount due upon policy No. 4145182 to be paid to the plaintiff.

The policy in question is what is known as an "Industrial Policy," which is a form of policy in which for a small weekly premium the life is insured for a small amount, in this instance \$75. The policy and applications were placed in evidence and together from the contract of insurance. In the application, Joseph Harrison, the defendant herein, was named as beneficiary, and no right was reserved to the insured to change the beneficiary without his consent. The policy itself refers to the application and states that it "is hereby made a part of the contract." It makes no further specific mention of a beneficiary except an agreement to pay the amount of the insurance "to the person or persons designated on condition fifth herein."

[1] Condition fifth is a clause which states that a production by the company of the policy and a receipt for the sum assured signed by an executor, administrator, husband or wife, or relative by blood or lawful beneficiary of the deceased, shall be conclusive evidence that it has been paid to the person lawfully entitled to receive it. It has been frequently held that such a clause, which is common in industrial policies is merely intended as a protection to the insurance company in making quick payment upon the policy and does not either "grant or take away a cause of action from any person" on the policy (Ruoff vs. John Hancock Mut. Life Ins. Co., 86 App. Div. 447, 83 N. Y. Supp. 758), so that, though

the company might have been protected under the terms of the policy in making payment to the plaintiff (*Cohen vs. John Hancock Mut. Life Ins. Co.*, 135 App. Div. 776, 119 N. Y. Supp. 850), the rights of the defendant as beneficiary are not affected by the clause. He is the beneficiary named in the policy, and no right to make a change of beneficiary without his consent existed. *Garner vs. Germania Life Ins. Co.*, 110 N. Y. 266, 18 N. E. 130, 1 I. R. A. 256; *Whitehead vs. N. Y. Life Ins. Co.*, 102 N. Y. 143, 6 N. E. 267, 55 Am. Rep. 787.

[2] The plaintiff's alleged rights under the policy were based upon a paper signed by the deceased which purported to change the beneficiary to her name, but there is no evidence that it was consented to by the defendant, and it is accordingly without legal effect. The defendant as the beneficiary designated in the policy is entitled to its proceeds, together with whatever proportion of the mortuary bonus of \$47.50 has accrued upon the policy. As the proportion of the aggregate bonus which belongs to this policy has not been shown, a new trial will have to be directed.

Judgment reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.



SUPREME LODGE K. P. *vs.* CONNELLY.*

(Supreme Court of Alabama.)

1. INSURANCE—MUTUAL BENEFIT INSURANCE—ACTION ON POLICY—QUESTION FOR JURY—AGENCY.

In an action against a fraternal order upon a certificate of insurance, whether a clerk of the local agent of the order had authority to refuse to receive a monthly assessment on the ground that the insured was not shown by the books to be a member of the order held, under the evidence, a question for the jury.

(For other cases, see *Insurance*, Cent. Dig. § 2009; Dec. Dig. § 825.)

2. INSURANCE—AGENCY FOR INSURER.

The power conferred on an agent representing an insurance company is not such that it cannot be delegated.

- (For other cases, see *Insurance*, Cent. Dig. § 1836; Dec. Dig. § 695.)

3. INSURANCE — MUTUAL BENEFIT INSURANCE — AGENCY FOR INSURER — POWERS OF AGENT — PROVISIONS IN POLICY.

A provision in a by-law of a fraternal order, which was made a part of an insurance policy, that no person should be agent of the order for the collection of assessments or authorized to receive any money, etc., until he should have executed a bond, and the same should have

* Decision rendered, Jan. 22, 1914. 64 South. Rep. 362.

been approved by the board of control, did not charge the insured with notice that an employee of a local agent had no authority to receive monthly assessments, or that the local agent had no authority to delegate such power to the clerk.

(For other cases, see Insurance, Cent. Dig. §§ 1903, 1905; Dec. Dig. § 753.)

4. INSURANCE—MUTUAL BENEFIT INSURANCE—ASSESSMENTS—TENDER—WAIVER.

Where the local agent of a fraternal order refused to receive a tendered monthly assessment by an insured on the ground that he was not a member of the order, the insured was not obligated to make tenders of subsequent assessments.

(For other cases, see Insurance, Cent. Dig. § 1906; Dec. Dig. § 754.)

5. INSURANCE—MUTUAL BENEFIT INSURANCE—NOTICE OF LOSS—ESTOPPEL OR WAIVER.

Where a fraternal order repudiated a contract with an insured and refused to receive a monthly assessment on the ground that he was not a member, the beneficiary of the policy was not obligated to make reasonable proof of the death of the insured, as required by the policy, in order to recover thereon.

(For other cases, see Insurance, Cent. Dig. §§ 1963-1965; Dec. Dig. § 789.)

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.
Action by Francis Connelly against the Supreme Lodge Knights of Pythias. Judgment for plaintiff, and defendant appeals. Affirmed.

Perdue & Cox, of Birmingham, for Appellant.
Allen & Bell, of Birmingham, for Appellee.



SUPREME FOREST WOODMEN CIRCLE *vs.* KNIGHT.*

(Court of Appeals of Alabama.)

1. INSURANCE—ACTION ON POLICY—EVIDENCE AS TO AGREEMENT OUTSIDE OF POLICY—STATUTE.

Under Code 1907, § 4579, providing that no insurance company shall make any agreement as to the policy contract other than that plainly expressed in the policy itself, and section 4562, excepting "any secret benevolent society such as Masons, Odd Fellows, * * * or others of like kind," a contract of insurance on the assessment plan, not showing that the insurer was either a secret or benevolent order, or that it issued the policy on other than a business basis for an equivalent received, was not within the exception, and hence evidence offered by it of an agreement as to the contract, shown only by an instrument separate from the policy, was properly excluded.

(For other cases, see Insurance, Cent. Dig. §§ 1673-1675; Dec. Dig. § 651.)

* Decision rendered, Dec. 18, 1913. 64 South. Rep. 196.

2. INSURANCE—ACTION ON CONTRACT—EVIDENCE AND ISSUES.

Where there was nothing in the terms of an insurance contract by which the insurer's liability would be affected by the fact that insured died of a heart disease, it was not error to exclude proof of such fact since it was immaterial and irrelevant.

(For other cases, see *Insurance*, Cent. Dig. §§ 1691-1693; Dec. Dig. § 659.)

Appeal from City Court of Bessemer; J. C. B. Gwin, Judge.

Action by Mary E. Knight against the Supreme Forest Woodmen Circle on an insurance policy contract on the life of William L. Knight in which plaintiff was named as beneficiary. Judgment for plaintiff, and defendant appeals. Affirmed.

J. T. Lowry, of Ensley, and Arthur H. Burnett, of Omaha, Neb., for Appellant.

Estes, Jones & Welch, of Bessemer, for Appellee.



JOHNSON *vs.* NEW YORK LIFE INS. CO. (SWANSON Interpleader).*

(Supreme Court of Colorado.)

1. PLEADING—MOTION FOR JUDGMENT.

Judgment on the pleadings is proper where the facts alleged in the pleadings, if admitted to be true, are such that no other judgment could have been rendered.

(For other cases, see *Pleading*, Cent. Dig. §§ 1048-1051; Dec. Dig. § 343.)

2. INSURANCE—LIFE POLICY—BENEFICIARY.

Where a life policy contains no provisions for a change of beneficiary the beneficiary acquires a vested interest which cannot be transferred by the insured without the beneficiary's consent, and, where the policy provides for a change, a beneficiary's interest, while subject to being defeated, can be defeated only in the manner prescribed in the policy. (For other cases, see *Insurance*, Cent. Dig. § 1469; Dec. Dig. § 587.)

3. INSURANCE—LIFE INSURANCE—CHANGE IN BENEFICIARY.

Where a life policy provided for change of beneficiary upon written notice to the insurer at the home office, the failure of insured to comply with the regulation cannot be excused because he was an ignorant foreigner, and was too poor to make several trips to the office or the agent who issued the policy; it appearing that he recognized the conditions in the policy by attempting at one time to comply with them.

(For other cases, see *Insurance*, Cent. Dig. § 1469; Dec. Dig. § 587.)

* Decision rendered, Nov. 3, 1913. Rehearing denied, Feb. 2, 1914. 13 Pac. Rep. 414.

4. INSURANCE—LIFE INSURANCE—ASSIGNMENTS.

Where a life policy is assigned, the assignee acquires only the rights of the insured, and such assignment will not divest the right of the beneficiary to collect the proceeds of the policy upon the death of the insured; it appearing that the only right insured had was to collect the policy upon maturity or to change the form of insurance.

(For other cases, see Insurance, Cent. Dig. §§ 488, 489, 494-496; Dec. Dig. § 219.)

Gabbert and Scott, JJ., dissenting.

En Banc. Error to District Court, city and county of Denver; Greeley W. Whitford, Judge.

Action by Sophia Peterson Johnson against the New York Life Insurance Company, in which Lisa Swanson interpleaded. There was a judgment for the interpleader, and plaintiff brings error. Affirmed.

Stark & Martin, of Denver, for Plaintiff in Error.

H. R. Sahlgard, M. B. Carpenter, and A. Newton Patton, all of Denver, for Interpleader.

Hindry & Friedman, Guy K. Brewster, George Allan Smith, and B. E. Woodward, all of Denver, Amici Curiae.



POLD vs. NORTH AMERICAN UNION.*

(Supreme Court of Illinois.)

1. INSURANCE — MUTUAL BENEFIT ASSOCIATION — CONTRACTS — POWER TO MAKE — FORFEITURE OF BENEFITS.

Under the general power of a mutual benefit association to make contracts for death benefits with its members, the power existed to insert a clause for forfeiture of benefits in case of suicide by the member; such clause having been authorized by a by-law regularly adopted by the association.

(For other cases, see Insurance, Cent. Dig. § 1956; Dec. Dig. § 788.)

2. INSURANCE—MUTUAL BENEFIT ASSOCIATION—POWERS —STATUTES.

Under Laws 1893, p. 130, prescribing powers conferred on mutual benefit associations, such an association had power to provide for forfeiture of benefits in case of suicide by the member, whether sane or insane.

(For other cases, see Insurance, Cent. Dig. § 1956; Dec. Dig. § 788.)

3. INSURANCE—MUTUAL BENEFIT SOCIETIES—BY-LAWS—BENEFITS—FORFEITURE—SUICIDE.

Where a mutual benefit certificate was accepted subject to the provision that the insured would comply with, and that the benefits should be subject to, all laws, rules, and usages then in force or that thereafter might be enacted, and the association thereafter properly adopted a

* Decision rendered, Dec. 17, 1913. Rehearing denied, Feb. 16, 1914
104 N. E. Rep. 4.

by-law providing that in case of a suicide of a member, he should forfeit all right to benefits, but that the beneficiary should receive a sum equal to the amount paid by the member to the mortuary fund, it was binding on the member, and, he having died from suicide, his beneficiary could only recover the amount actually paid into the mortuary fund, notwithstanding the original charter of the society, providing that it was organized to establish a benefit fund from which a death benefit should be paid on the death of a beneficiary member in good standing, etc.

(For other cases, see *Insurance, Cent. Dig.* § 1855; *Dec. Dig.* § 719.)

Appeal from Appellate Court, First District, on Error to Municipal Court of Chicago; Edward A. Dicker, Judge.

Action by Johanna Pold against the North American Union. Judgment for plaintiff for less than relief demanded, and she appeals. Affirmed.

George F. Barrett, of Plano, and Edmund S. Cummings, of Chicago, for Appellant.

Robert S. Iles, of Chicago, for Appellee.

**JOHNSON *vs.* GRAND LODGE A. O. U. W. OF KANSAS,
ET AL.***

(Supreme Court of Kansas.)

INSURANCE — DIVORCE — FRATERNAL BENEFIT CERTIFICATE—BENEFICIARY — DIVORCED WIFE — BURDEN OF PROOF.

An insurance policy for \$2,000, issued by a fraternal benefit association upon the life of a member, named his wife as the beneficiary. She obtained a decree of divorce from her husband and a judgment in her favor for \$1,500, which the decree of divorce provided should be a lien upon certain property owned by the husband. Six days after the divorce was granted the husband died without having designated another beneficiary. In an action by the former wife against his heirs to recover the proceeds of the policy, it is held:—

- (a) Under the by-laws of the association and by the express provisions of section 4303, General Statutes 1909, the plaintiff would not be entitled to payment of the certificate unless she was dependent upon the member at the time of his death.
- (b) Whether the plaintiff in this case was dependent within the meaning of the by-laws and the provisions of the statutes depended upon facts, the burden of proving which rested upon her.
- (c) Notwithstanding the complete dissolution of the marriage relation by the decree of divorce, if it were shown that by the death of her former husband the plaintiff was deprived of all means to enforce the collection of her judgment, she would be regarded as a dependent upon him to the extent of her interest in the judgment, and in that

* Decision rendered, Jan. 10, 1914. 137 Pac. Rep. 1190. Syllabus by the Court.

event she could maintain an action upon the policy to recover the amount of the judgment and costs, but no more. Any balance due upon the policy would, in that event, be payable to the heirs of the member.

- (d) The fact alone that when the death of the former husband occurred her judgment had not been satisfied, would not make her a dependent upon him if his death did not prevent the collection of her judgment.
- (e) Since every reasonable inference to be drawn from the record and from plaintiff's attitude in the court below, as well as here, compels the conclusion that there is nothing to prevent her from obtaining full satisfaction of her judgment, she is not a dependent upon her former husband, and therefore cannot maintain the action.

(For other cases, see *Insurance*, Cent. Dig. §§ 1936, 1967-1972, 1976, 1980, 1999-2002; Dec. Dig. §§ 793, 797, 817; *Divorce*, Cent. Dig. § 551; Dec. Dig. § 169.)

Appeal from District Court, Sedgwick County.

Action by Cora A. Johnson against the Grand Lodge Ancient Order of United Workmen of Kansas and others. From judgment for defendants, plaintiff appeals. Affirmed.

Dale & Amidon, of Wichita, for Appellant.

George Gardner and Jean Madalene, both of Wichita, for Appellees.



KNIGHTS OF MACCABEES OF THE WORLD *vs.*

SHIELDS.*

(Court of Appeals of Kentucky.)

INSURANCE—FRAUD IN OBTAINING POLICY—RETURN OF PREMIUM—TENDER.

It is unnecessary that defendant, with its defense, that the insurance policy sued on was obtained by fraud, tender the premiums received; but, if it prevails, there should be a judgment against it for such premiums, without additional pleadings and evidence unless necessary to disclose the amount.

(For other cases, see *Insurance*, Cent. Dig. § 570; Dec. Dig. § 269.)

On petition for rehearing. Overruled.

For former opinion see 156 Ky. 270, 160 S. W. 1043.

* Decision rendered, Jan. 20, 1914. 162 S. W. Rep. 778.

SECURITY MUT. LIFE INS. CO. vs. LITTLE.*
 (Court of Appeals of Kentucky.)

1. INSURANCE — ACTIONS ON POLICIES — QUESTIONS FOR JURY.

In an action on a life insurance policy, evidence as to the materiality of false representations by insured concerning the previous conditions of his health held to make a question for the jury and to support a verdict for plaintiff.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

2. TRIAL—PROVINCE OF COURT AND JURY—WEIGHT OF EVIDENCE.

Before a jury should be deprived of the right to pass upon and weigh expert testimony, it should clearly appear that there is absolutely no conflict in such testimony or in the evidence upon which it is based.

(For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.)

Appeal from Circuit Court, Hickman County.

Action by John T. Little against the Security Mutual Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Bruce & Bullitt and Keith L. Bullitt, all of Louisville, and R. L. Smith, of Clinton, for Appellant.

Robbins & Robbins, of Mayfield, and Bennett, Robbins & Thomas, of Clinton, for Appellee.

* Decision rendered, Feb. 5, 1914. 162 S. W. Rep. 1131.

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WESTERN & SOUTHERN LIFE INS. CO. vs. GILTNANE.*
 (Court of Appeals of Kentucky.)

i. CONTINUANCE—RIGHT—AMENDMENT OF PLEADINGS.

Where the petition, in an action on a life insurance policy, did not allege payment of weekly premiums as required by the contract, the amendment of the petition by alleging such facts was not ground for a continuance on application of the insurer.

(For other cases, see Continuance, Cent. Dig. §§ 99-112; Dec. Dig. § 30.)

2. INSURANCE—LIFE INSURANCE—TENDER OF PREMIUMS.

When insured applied for additional insurance, the local agent told her that it would be necessary to deliver the old policy to him before another could be issued, and, after receiving the policy, the company refused to return it or receive any further premiums, on the ground that an examination of insured showed that she was not then an insurable risk.

* Decision rendered, Feb. 5, 1914. 163 S. W. Rep. 192.

Held, that the company's notice that it would not receive any further premiums relieved insured from the necessity of thereafter tendering such premiums, so that she was not in default for not doing so.
(For other cases, see Insurance, Cent. Dig. §§ 925-960; Dec. Dig. § 362.)

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by Annie Giltnane against the Western & Southern Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Lanier & Lanier, and Du Relle & Fleece, all of Louisville, for Appellant.

Duffin, Sapinsky & Duffin and Thos. Walsh, all of Louisville, for Appellee.

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SHOREY vs. WEBB.*

(Court of Appeals of Maryland.)

INSURANCE—LIFE INSURANCE—ASSIGNMENT—DELIVERY—EVIDENCE.

Evidence that insured executed a formal assignment to his wife of the policy on his life, that it was sent to the home office of the insurer, to be noted or recorded by it in accordance with the terms of the policy and that, after it was acknowledged and returned by insurer, it was pasted on the policy, and so remained for more than thirty years, till after the death of the wife, is sufficient to warrant the presumption of legal delivery of the assignment; not negatived by the assignment being found among insured's papers after his death, subsequent to hers.

(For other cases, see Insurance, Cent. Dig. § 480; Dec. Dig. § 211.)

Appeal from Circuit Court of Baltimore City; Henry Duffy, Judge.

"To be officially reported."

Suit by Augusta Webb against Mary Jane Shorey, administratrix of Margaret Ella Webb, deceased. Decree for complainant, and defendant appeals. Reversed and remanded.

Argued before Boyd, C. J., and Briscoe, Thomas, Urner, Stockbridge, and Constable, JJ.

Charles F. Harley of Baltimore (Harley & Wheltie, of Baltimore, on the brief), for Appellant.

H. Marcus Denison and Richard S. Culbreth, both of Baltimore, for Appellee.

* Decision rendered, Jan 13, 1914. 89 Atl. Rep. 391.

OXMON *vs.* MODERN WOODMEN OF AMERICA.*
(Supreme Court of Minnesota.)

INSURANCE — FRATERNAL BENEFICIARY ASSOCIATION — PROCESS.

Section 3555, Gen. St. 1913, authorizing service of process upon a foreign beneficiary association by serving the same upon the insurance commissioner provides, "that no such service shall be valid or binding against any such association when it is required thereunder to file its answer, pleading or defense in less than thirty days after the date of such service." The summons in question required defendant to answer within twenty days from service thereof, and judgment by default was entered twenty-two days after such service, *held*: That such service and such judgment are not binding upon defendant and must be set aside.

(For other cases, see *Insurance*, Cent. Dig. §§ 1573, 1574; Dec. Dig. § 627.)
Hallam, J., dissenting in part.

Appeal from District Court, Ramsey County; Frederick M. Catlin, Judge.

Action by Motel Oxmon against the Modern Woodmen of America. From adverse orders, defendant appeals. Reversed.

Benjamin D. Smith, of Mankato, and Percy D. Godfrey, of St. Paul, for Appellant.

James Markham and Benjamin Calmenson, both of St. Paul, for Respondent.

* Decision rendered, Jan. 23, 1914. 145 N. W. Rep. 171. Syllabus by the Court.



RUDER *vs.* NATIONAL COUNCIL, KNIGHTS AND LADIES OF SECURITY.*

(Supreme Court of Minnesota.)

1. EVIDENCE—PRESUMPTION—MAILING OF LETTER.

Where a letter is deposited in the mails, postage paid and properly addressed, there is a strong presumption that it reached its destination in due course of mail. Applying this presumption, the jury was justified in finding that a cashier's check testified as having been mailed to defendant in payment of an assessment was received by it. The jury was also justified in believing that the check had been mailed.

(For other cases, see *Evidence*, Cent. Dig. § 92; Dec. Dig. § 71.)

* Decision rendered, Jan. 30, 1914. 145 N. W. Rep. 118. Syllabus by the Court.

2. INSURANCE—ACTION ON CERTIFICATE—PAYMENT OF ASSESSMENT—QUESTION FOR JURY.

The trial court did not err in answering a question asked by a juror.
(For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.)

3. INSURANCE—FRATERNAL INSURANCE ASSOCIATION—CHANGE OF RULES—RETROACTIVE EFFECT.

Rosenstein vs. Court of Honor, 122 Minn. 310, 142 N. W. 331, followed and applied to the effect that a by-law of defendant adopted after a benefit certificate was issued, and changing the limit of time for bringing an action on the certificate, is not binding upon the certificate holder or his beneficiary. Laws 1907, c. 345, § 8 (Gen. St. 1913, § 3544), does not apply to benefit certificates issued before its enactment.

(For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.)

4. TRIAL—DELIBERATIONS OF JURY—TRANSCRIPT OF TESTIMONY.

It was not error to decline to permit the jury, on its request, to have a transcript of the testimony of a witness given on a former trial.
(For other cases, see Trial, Cent. Dig. §§ 732-737; Dec. Dig. § 307.)

5. TRIAL—DELIBERATIONS OF JURY—DOCUMENTARY EVIDENCE.

It was not error to refuse to permit a letter in evidence to be taken into the jury room; the letter being read to the jury instead.
(For other cases, see Trial, Cent. Dig. §§ 732-737; Dec. Dig. § 307.)

6. APPEAL AND ERROR—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

It was not prejudicial error to sustain objections to questions calling for declarations of the deceased to the effect that he intended not to pay assessments in the future.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.)

Appeal from District Court, Ramsey County; James H. Quinn, Judge. Action by Jacob Ruder against the National Council of the Knights and Ladies of Security. Verdict for plaintiff, and from a denial of an alternative motion for judgment or new trial, defendant appeals. Affirmed.

William G. White, of St. Paul (Harvey E. Hall, of St. Paul, of counsel), for Appellant.

A. J. Hertz, of St. Paul (James E. Markham, of St. Paul, of counsel), for Respondent.

KULBERG ET AL. vs. NATIONAL COUNCIL, KNIGHTS
AND LADIES OF SECURITY.*

(Supreme Court of Minnesota.)

1. INSURANCE — FRATERNAL BENEFIT ASSOCIATION — EXPULSION OF MEMBERS—RESORT TO COURTS—CONDITION PRECEDENT.

Rules and regulations of a fraternal benefit association concerning procedure for expulsion of members are valid and binding if not so grossly unfair as to be contrary to public policy; and an appeal within the order from an expulsion may be made a condition precedent to the right to resort to the courts.

(For other cases, see Insurance, Cent. Dig. §§ 1834, 1835; Dec. Dig. § 694.)

2. INSURANCE—FRATERNAL BENEFIT ASSOCIATION—EXPULSION OF MEMBERS—RESORT TO COURTS—CONDITION PRECEDENT.

To render the requirement of such an appeal operative there must be a hearing in accordance with the laws of the order; but mere irregularities of procedure short of substantial denial of the hearing contemplated by the contract of the parties are remediable in the first instance only as provided therein.

(For other cases, see Insurance, Cent. Dig. §§ 1834, 1835; Dec. Dig. § 694.)

3. INSURANCE—ACTION ON BENEFIT CERTIFICATE—EXPULSION OF MEMBER—SUFFICIENCY OF EVIDENCE.

As against defendant's request for a directed verdict in an action upon a benefit certificate, evidence held sufficient to take the case to the jury on the question whether the hearing pursuant to which assured was expelled was such as to deprive the court of jurisdiction because no appeal was taken within the order.

(For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.)

4. INSURANCE—ACTION ON BENEFIT CERTIFICATE—EXPULSION OF MEMBER—BURDEN OF PROOF.

The burden of establishing the fact of such hearing was on defendant.

(For other cases, see Insurance, Cent. Dig. §§ 1999-2002; Dec. Dig. § 817.)

5. INSURANCE—ACTION ON BENEFIT CERTIFICATE—EXPULSION OF MEMBER—NOTICE OF HEARING—SUFFICIENCY OF EVIDENCE.

Evidence held insufficient to establish a valid expulsion, in that it indicated the order was based, in part at least, upon evidence taken at a time and place of which assured had no notice or else he was justified in so believing.

(For other cases, see Insurance, Cent. Dig. §§ 1834, 1835; Dec. Dig. § 694.)

* Decision rendered, Jan. 30, 1914. 145 N. W. Rep. 120. Syllabus by the Court.

6. INSURANCE—ACTION ON BENEFIT CERTIFICATE—EXPULSION OF MEMBER—SUFFICIENCY OF EVIDENCE.

- Evidence held to show neither acquiescence in the order of expulsion nor abandonment of membership.
(For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.)

7. INSURANCE—BENEFIT CERTIFICATE—TENDER OF DUES—NECESSITY—RECOVERY.

Defendant having clearly indicated its intention to refuse further recognition of assured's membership, subsequent tender of dues and assessments was not necessary to keep the certificate of membership in force; but a recovery would be subject to deduction thereof.

(For other cases, see Insurance, Cent. Dig. §§ 1906, 2013; Dec. Dig. §§ 754, 821.)

8. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Evidence upon the affirmative defense of a valid expulsion, after hearing, for certain offenses against the order, including misrepresentation of age, being such that the court would have been justified in charging failure to establish it, and this being the only issue submitted, and there being no other proper to be submitted, admission of testimony tending to refute the charge of such misrepresentation was without prejudice to defendant, though irrelevant.

(For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.)

Appeal from District Court, Ramsey County; James H. Quinn, Judge. Action by Isadore Kulberg and others against the National Council of Knights and Ladies of Security. From a judgment for plaintiffs, defendant appeals. Affirmed.

William G. White, of St. Paul, for Appellant.
A. J. Hertz, of St. Paul (James E. Markham, of St. Paul, of counsel), for Respondents.



HUGHES *vs.* MODERN WOODMEN OF AMERICA.*

(Supreme Court of Minnesota.)

1. INSURANCE—BENEFIT CERTIFICATE—RIGHTS OF BENEFICIARY.

The beneficiary named in a benefit certificate issued by a fraternal beneficiary association acquires no vested interest thereunder until the death of the assured, and his expectant interest may be defeated at any time prior thereto by the proper substitution of another in his stead; but his

* Decision rendered, Feb. 6, 1914. 145 N. W. Rep. 387. Syllabus by the Court.

interest becomes fixed and vested at such death, and cannot be defeated thereafter.

(For other cases, see *Insurance, Cent. Dig.* §§ 1949-1954; *Dec. Dig.* §§ 783, 784.)

2. INSURANCE—BENEFIT CERTIFICATE—CHANGE OF BENEFICIARY.

If the assured has done all the things required of him to make a change in beneficiary, his death before the issuance of the new certificate required by the by-laws will not defeat such change, in the absence of an express provision in the contract specifying when the change shall take effect.

(For other cases, see *Insurance, Cent. Dig.* §§ 1950-1954; *Dec. Dig.* § 784.)

3. INSURANCE—BENEFIT CERTIFICATE—CHANGE OF BENEFICIARY.

Where the contract provided that "no change in the designation of beneficiary or beneficiaries shall be effective until a new certificate shall have been issued during the lifetime of the member, and until such time the provisions of the old certificate shall remain in force," and the request for the change was not received until after the death of the member, the proposed change did not become effective.

(For other cases, see *Insurance, Cent. Dig.* §§ 1950-1954; *Dec. Dig.* § 784.)

Appeal from District Court, Ramsey County; Wm. Louis Kelley, Judge.

Action by Catherine Hughes against the Modern Woodmen of America. Verdict for plaintiff. From denial of motion for new trial, defendant appeals. Affirmed.

Percy D. Godfrey, of St. Paul, for Appellant.
Daniel Doty, of St. Paul, for Respondent.



TIERNEY vs. MODERN WOODMEN OF AMERICA.* (Supreme Court of Minnesota.)

Appeal from District Court, Hennepin County; Wilbur F. Booth, Judge.

Action by Anna Hyland Tierney against the Modern Woodmen of America. From denial of new trial, plaintiff appeals. Affirmed.

J. L. Murphy and Thos. B. Kilbride, both of Minneapolis, for Appellant.

Benj. D. Smith, of Mankato, and Elijah Barton, of Minneapolis, for Respondent.

Per Curiam. This case involves the same certificate considered in *Hughes vs. Modern Woodmen*, 145 N. W. 387, filed herewth. Plaintiff, the daughter of the assured, brought this action in the District Court of Hen-

* Decision rendered, Feb. 6, 1914. 145 N. W. Rep. 390.

nepin County to recover thereon. The trial court found that she was not the beneficiary thereunder, and directed judgment for defendant. She made a motion for a new trial, which was denied, and she appealed.

The case is controlled by the decision in the Hughes Case, and the order appealed from is affirmed.



DE RUNTZ *vs.* ST. LOUIS POLICE RELIEF ASS'N.*

(St. Louis Court of Appeals. Missouri.)

1. PLEADING—PETITION—CONCLUSIONS.

In an action to recover a benefit from a police relief association, certain paragraphs of the petition alleged that it was provided by the laws established by the board of police commissioners of the city of St. Louis for the government and regulation of the police force that the board would require every member of the force to join the association, and no person should be assigned to duty until he had first signed an application to become a member of the association, that any member who neglected to pay his dues and assessments or refused to become a member should be sent before the board, and on his refusal to comply with the rule might be dismissed, and that such provision established by the commissioners was contained in the official manual of the department and was reasonable and recognized by the association as binding upon it. Another paragraph alleged that the intent and purpose of the laws of the state and the regulations of the department and of defendant association was to compel every member of the police department, under pain of dismissal, to become a member of the association, that it had no power to refuse membership to any member of the police force who made application within thirty days after his appointment, but that the intent and purpose of the association and the reasonable construction of its charter and by-laws was that any member of the force, on making written application within thirty days after his appointment, should ipso facto become a member. *Held*, that such paragraphs were properly stricken as stating conclusions of law and not facts.

(For other cases, see Pleading. Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.)

2. PLEADING — ACTIONS FOR BENEFITS — PETITION — CONCLUSIONS.

In an action against a police relief association to recover death benefits, clauses of the petition averring that decedent did all things required by defendant's laws to become a member, that by virtue of such compliance he did become a member, and in compliance with defendant's rules he designated plaintiff as his beneficiary, who on his death became entitled to \$2,000, and that decedent, having in his lifetime complied with all defendant's laws, rules, and regulations, at the time of his death was a member of defendant in good standing, and plaintiff, having been his wife and duly designated as his beneficiary, was entitled to the benefits accrued, were not subject to a motion to strike as pleading conclusions of law and not facts, under Rev. St. 1909, §

* Decision rendered, Dec. 31, 1913. 162 S. W. Rep. 1053.

1836, declaring that in alleging performance of a contract it shall be necessary to state the facts showing such performance, but it may be alleged generally that the party duly performed all the conditions on his part.

(For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.)

3. INSURANCE—ACTION BY BENEFICIARY—PLEADING.

In an action by a beneficiary on an insurance contract, the petition must allege privity between plaintiff and the insured.

(For other cases, see Insurance, Cent. Dig. §§ 1996-1998; Dec. Dig. § 815.)

4. PLEADING—CONCLUSIONS—SURPLUSAGE.

In an action against a police relief association to recover death benefits, allegations in the petition, that by virtue of the rules of the board of police commissioners decedent as a policeman was a member of defendant association, etc., were mere conclusions of law and might be stricken, if specifically attacked, but their presence in the petition was mere surplusage, and did not vitiate the remainder.

(For other cases, see Pleading, Cent. Dig. §§ 76-80; Dec. Dig. § 35.)

5. INSURANCE — POLICE DEPARTMENT — RELIEF ASSOCIATION—ORGANIZATION.

The St. Louis Police Relief Association is neither a public nor quasi public corporation, but a private corporation, the organization of which is specifically authorized by Rev. St. 1909, § 3458, to create a special fund for specific purposes, which fund is private, and does not in any sense belong to the public.

(For other cases, see Insurance, Cent. Dig. § 1824; Dec. Dig. § 687.)

6. INSURANCE — POLICE DEPARTMENT — RELIEF ASSOCIATION — MANAGEMENT—MEMBERS.

The St. Louis Police Relief Association, organized under Rev. St. 1909, § 3458, is a private association governed by its own members, and not under the control of the governing officials of the board of police commissioners, nor is there any mandatory requirement making membership in the association by members of the force essential to their position, or otherwise than optional; and hence an allegation in an action for benefits that the board of police commissioners had adopted a rule making it compulsory for the members of the department to become members of the association did not show that all members of the force were, by reason of such rule, members of the association.

(For other cases, see Insurance, Cent. Dig. §§ 1996-1998; Dec. Dig. § 815.)

Appeal from St. Louis Circuit Court; Geo. C. Hitchcock, Judge
Action by Mary De Runtz against the St. Louis Police Relief Association. From a judgment striking out certain parts of the petition, and sustaining a demurrer to what remained, plaintiff appeals. Reversed and remanded.

O'Neill Ryan, James C. Campbell, and F. H. Bacon, all of St. Louis, for Appellant.

Johnson, Houts, Marlott & Hawes, and Johnson, Rutledge & Lashly, all of St. Louis, for Respondent.

WALKER vs. SUPREME KNIGHTS OF MACCABEES.*

(Kansas City Court of Appeals. Missouri.)

1. INSURANCE—MUTUAL BENEFIT INSURANCE—PROOF OF LOSS—WAIVER.

Where a fraternal insurance association refused to pay a loss under a certificate on the ground that the certificate had been forfeited and that there had been a failure to make proofs of loss the pleading of the invalidity of the certificate constituted a waiver of the necessity of furnishing proofs of loss.

(For other cases, see Insurance, Cent. Dig. §§ 1963-1965; Dec. Dig. § 789.)

2. INSURANCE—MUTUAL BENEFIT INSURANCE—PROOF OF LOSS.

Where a mutual benefit association defended a suit on a certificate on the ground of lack of proofs of loss and, after plaintiff had taken a voluntary nonsuit, furnished plaintiff with blanks on which were made proofs of loss, such action constituted a waiver of the failure of plaintiff to make proofs of loss within the time limited.

(For other cases, see Insurance, Cent. Dig. §§ 1963-1965; Dec. Dig. § 789.)

Appeal from Circuit Court, Carroll County; Frank P. Divelbliss, Judge.

Action by G. A. Walker, as administrator of Fannie Miller, deceased, against the Supreme Knights of Maccabees. From a judgment for plaintiff, defendant appeals. Affirmed.

R. P. & C. B. Williams, of St. Louis, for Appellant.

Jones & Conklin and Chas. R. Pattison, all of Carrollton, for Respondent.

* Decision rendered, Jan. 5, 1914. Rehearing denied, Feb. 2, 1914. 163 S. W. Rep. 274.

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RIPPEL vs. PRUDENTIAL INS. CO. OF AMERICA.*

(Supreme Court of New Jersey.)

CONSTITUTIONAL LAW — LEGISLATIVE POWER — LEGISLATIVE AGENT.

The vesting by Act March 24, 1913 (P. L. p. 152), in the Chancellor, as legislative agent, through whose instrumentality the proceeding there provided for, for acquisition by a stock life insurance company of its stock for the benefit of its policyholders, shall be administered, of authority to appoint appraisers to appraise the stock, as a basis for voting by stockholders and policyholders, on propositions to be submitted to them, is a matter of legislative discretion.

(For other cases, see Constitutional Law, Cent. Dig. §§ 103-107; Dec. Dig. § 61.)

* Decision rendered, Jan. 23, 1914. 89 Atl. Rep. 548.

Certiorari by Julius B. Rippel against the Prudential Insurance Company of America to review an order of the Chancellor appointing appraisers. Affirmed.

Argued November term, 1913. before Garrison, Trenchard, and Minburn, JJ.

John R. Hardin and Robert H. McCarter, both of Newark, for Plaintiff.

Edward D. Duffield and Richard V. Lindabury, both of Newark, for Defendant.

John W. Griggs, of Paterson, and Merritt Lane, of Jersey City, for Policyholders.



GRABINSKI vs. UNITED STATES ANNUITY & LIFE INS. CO.*

(Supreme Court of South Dakota.)

1. INSURANCE—LIFE INSURANCE—RETURN OF PREMIUM.
Civ. Code, §§ 1862, 1863, providing that insured is entitled to a return of the premium paid, if the company has incurred no risk or liability under the policy for which the premium was paid, is declaratory of the common-law rule.

(For other cases, see *Insurance*, Cent. Dig. §§ 457-467; Dec. Dig. § 198.)

2. JUDGMENT—RES JUDICATA—MATTERS WHICH COULD NOT HAVE BEEN LITIGATED.

Plaintiff deposited in escrow his note for the first premium on a life policy for delivery when the policy was issued. No policy was issued but the note was wrongfully obtained from escrow, and came into the hands of the state agent of the company, who obtained judgment and enforced payment from plaintiff. Held that, since payment of the premium was necessary before plaintiff could sue for its return under Civ. Code, §§ 1862, 1863, entitling insured thereto where no risk or liability was incurred, the right to a return of the premium was not concluded by the judgment on the note.

(For other cases, see *Judgment*, Cent. Dig. §§ 1062-1064, 1067, 1073, 1085, 1092-1095, 1132; Dec. Dig. § 585.)

Appeal from Circuit Court, Faulk County; J. H. Bottum, Judge.
Action by Herman Grabinski against the United States Annuity & Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Harry Kunkle, of Yankton, for Appellant.
Frank Turner, of Faulkton, for Respondent.

* Decision rendered, Feb. 14, 1914. 145 N. W. Rep. 553.

GENERES vs. SECURITY LIFE INS. CO. OF AMERICA.*

(Court of Civil Appeals of Texas. Dallas.)

1. EVIDENCE—PAROL EVIDENCE—CONSTRUCTION OF CONTRACT—EXISTENCE OF AMBIGUITY.

A contract between an insurance company and an agent provided that the agent was to receive a specified salary, and, in addition thereto, commissions according to a certain scale, and that, at the end of a certain time, the company would add together the salary, commissions, expenses, etc., and, if the total cost of the business was less than commissions according to a scale therein set out, the agent should receive the difference. An amendment to this contract provided, among other things, that the agent's monthly drawing account should be increased to \$350. *Held*, that the two contracts, when considered together, presented an ambiguity, in that in the first the agent's compensation was designated a salary, and in the second an advance against commissions, thus rendering parol evidence admissible.

(For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 450.)

2. INSURANCE—AGENTS—COMPENSATION—EVIDENCE—SUFFICIENCY.

In an action by an insurance agent against the company to recover upon agency contracts, evidence *held* to support a finding that it was the intention of the parties in the execution of the contracts that the agent should be allowed a monthly advance to be charged against his commissions to be earned under the contracts, and that the advances were not intended as a salary to be paid in addition to the commissions.

(For other cases, see Insurance, Cent. Dig. §§ 111-114; Dec. Dig. § 84.)

3. INSURANCE — AGENT — CONTRACT OF EMPLOYMENT — CONSTRUCTION BY PARTIES.

A contract between an insurance agent and the company provided that the agent was to receive a specified salary, and, in addition thereto, commissions computed according to a specified scale; that, at the end of a certain time, the company would add together the salary and commissions, and all expenses, and, if the cost of the business was less than a specified scale of commissions, the agent was to receive the difference. Both the agent and the company treated the contract as though he were working under the larger scale of commissions, and treated the salary as a monthly advance against these commissions. *Held*, that the agent was estopped, after so construing the contract, and acquiescing in the same construction thereof by the company, to thereafter insist that he was working on a salary basis.

(For other cases, see Insurance, Cent. Dig. §§ 111-114; Dec. Dig. § 84.)

4. INSURANCE—ACCOUNTING BY AGENT—SUFFICIENCY OF EVIDENCE.

In an action by an agent against an insurance company, evidence *held* to support a finding that notes received by the agent upon premiums, and sent to the company, were, with the agent's knowledge, only received by the company as collateral to his account, and he was not entitled to commissions until the notes were paid.

(For other cases, see Insurance, Cent. Dig. §§ 111-114; Dec. Dig. § 84.)

* Decision rendered, Jan. 10, 1914. 163 S. W. Rep. 386.

5. ACCOUNT STATED—ASSENT OF PARTIES.

Where the secretary of an insurance company took from the books an itemized statement of the account with an agent and the agent went carefully over it and pointed out two or three errors which were accordingly corrected, and said that the account was otherwise correct, there was an account stated.

(For other cases, see *Account Stated*, Cent. Dig. §§ 30-39; Dec. Dig. § 6.)

6. ACCOUNT STATED — IMPLIED CONSENT — ESTOPPEL — GROUNDS.

Where an insurance agent knew that the company was making an advance to him on the belief that certain items of dispute were settled by account stated, the agent was estopped to thereafter insist that there was no account stated.

(For other cases, see *Account Stated*, Cent. Dig. §§ 30-39; Dec. Dig. § 6.)

7. APPEAL AND ERROR—ASSIGNMENT OF ERROR—NECESSITY OF STATEMENT.

An assignment not followed by a sufficient statement of facts to enable the court to determine, without resort to the record, whether there was error in the ruling complained of will not be considered.

(For other cases, see *Appeal and Error*, Cent. Dig. § 3000; Dec. Dig. 742.)

Appeal from District Court, Dallas County; Kenneth Foree, Judge. Action by L. M. Generes against the Security Life Insurance Company of America. From a judgment for defendant, plaintiff appeals. Affirmed.

Love & Taylor and Royall R. Watkins, all of Dallas, for Appellant. Bull & Johnson, of Chicago, Ill., and Allen & Flanary, of Dallas, for Appellee.

GRAND LODGE, F. & A. M. OF TEXAS vs. DILLARD.*

(Court of Civil Appeals of Texas. Galveston.)

1. APPEAL AND ERROR—ASSIGNMENT OF ERROR—PROPOSITION AND STATEMENT.

In an assignment of error to the admission of conversations with and statements made to plaintiff by her deceased husband as to the payment of his relief dues, with the proposition that the testimony was inadmissible under the statute forbidding an heir or representative to testify as to any transaction with or statements by a deceased, unless called by the opposite party, the statement: "St. F. P. 1 & 2. Also see Bill of Exceptions No. one, page 18"—did not comply with Court of Civil Appeals rule 31 (142 S. W. xii), providing that the statement must be made faithfully in reference to the whole of that which is

* Decision rendered, Dec. 15, 1913. Rehearing denied, Jan. 8, 1914. 16 S. W. Rep. 1173.

in the record having a bearing on the proposition, and hence would not be considered.

(For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.)

2. WITNESSES—TRANSACTION WITH DECEDENT—ACTION ON BENEFIT CERTIFICATE.

In an action on a benefit certificate issued to plaintiff's husband, in which she was named as beneficiary, so that she claimed nothing as his heir, but upon his death in good standing, became at once in her own right and by contract entitled to the moneys due, she was a competent witness to testify as to conversations with him referring to the payment of his dues.

(For other cases, see Witnesses, Cent. Dig. §§ 629, 664, 666-669, 671-682; Dec. Dig. § 159.)

3. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—SUFFICIENCY—RULE OF COURT.

In an assignment of error in the exclusion of documentary evidence, a statement giving no information of the substance of the excluded evidence or as to what was contained therein was not a compliance with Courts of Civil Appeals rule 31 (142 S. W. xii), prescribing the requirements of a statement.

(For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.)

4. APPPEAL AND ERROR — ASSIGNMENTS OF ERROR — STATUTES AND RULES OF COURT.

Courts of Civil Appeals rule 31 (142 S. W. xii), prescribing the requisites of the statement in an assignment of error, was not abrogated or affected by Acts 33d Leg. c. 136, amending Rev. Civ. St. 1911, art. 1612, providing that an assignment of error which directs the attention of the court to the error complained of shall be sufficient.

(For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.)

5. INSURANCE—MUTUAL BENEFIT INSURANCE—CONSTRUCTION—FORFEITURE.

A provision in the by-laws of a lodge that, on a member's failure to pay his dues the lodge "shall suspend him" rendered him subject to suspension, but did not, on his failure to pay, ipso facto suspend him, without any action of the lodge.

(For other cases, see Insurance, Cent. Dig. §§ 1895, 1896, 1903; Dec. Dig. § 750.)

6. INSURANCE—ACTION ON CERTIFICATE—QUESTION FOR JURY—ARREARS.

Where the evidence in an action on a benefit certificate was conflicting as to whether deceased was in arrears or had been legally suspended at the time of his death, the issue was properly left to the jury.

(For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.)

7. APPEAL AND ERROR—OBJECTION BELOW—INSTRUCTIONS—REQUEST—NECESSITY.

Where a party thinks it necessary that the jury be instructed more particularly, he should request a special charge to that effect, and cannot complain on appeal, if he does not.

(For other cases, see Appeal and Error, Dec. Dig. § 216; Trial, Cent. Dig. § 627.)

Appeal from Harris County Court; Clark C. Wren, Judge.
Action by Emma Dillard against the Grand Lodge of Free and Accepted Masons of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank E. Anderson and J. E. Melton, both of Houston, for Appellant.
Woods & Harris, of Houston, for Appellee.



TABOR ET AL. v. MODERN WOODMEN OF AMERICA.*
(Court of Civil Appeals of Texas. Ft. Worth.)

1. INSURANCE — FRATERNAL INSURANCE — DEATH DURING SUSPENSION—BY-LAWS.

Where a by-law of a fraternal association provides that a member failing to pay a benefit assessment shall be suspended and that during such suspension his benefit certificate shall be absolutely void, where a member dies during his suspension, his beneficiaries have no interest in the certificate, although by another by-law a member was given the right to be reinstated on payment of all his dues within sixty days, which term had not expired at the time of the member's death.

(For other cases, see Insurance, Cent. Dig. § 1919; Dec. Dig. § 757.)

2. INSURANCE — BENEFIT INSURANCE — SUSPENSION OF MEMBER.

Where an assessment was levied November 17, 1910, and under the terms of the benefit certificate the member had until the last day of December, 1910, to pay such assessment, failure to pay on or before December 31, 1910, forfeited the certificate, and the beneficiaries were not, after decedent's death, allowed sixty days, given to the member under a by-law, after such forfeiture to make the delinquent payment and reinstate the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1920, 1921; Dec. Dig. § 759.)

Appeal from District Court, Wichita County; P. A. Martin, Judge.
Action by Minnie Tabor, individually and as next friend, etc., against the Modern Woodmen of America. Judgment for defendant, and plaintiff appeals. Affirmed.

Smoot & Smoot, of Wichita Falls, for Appellant.
Carrigan, Montgomery & Britain, of Wichita Falls, for Appellee.

* Decision rendered, Nov. 22, 1913. Rehearing denied, Jan. 10, 1914. 163 S. W. Rep. 324.

**METROPOLITAN LIFE INS. CO. OF NEW YORK vs.
O'GRADY.***

(Supreme Court of Appeals of Virginia.)

1. EVIDENCE—ADMISSIONS—INTEREST—INSURANCE.

In an action on a life insurance policy, declarations made by the insured before he applied for insurance are not admissible, the person making them must at the time have some interest in the matter afterwards in controversy.

(For other cases, see Evidence, Cent. Dig. §§ 693-696; Dec. Dig. § 202.)

2. EVIDENCE — DECLARATIONS OF INSURED — ADMISSION AGAINST BENEFICIARY.

In an action by a beneficiary on a life insurance policy where defense is made on the ground that the insured had misrepresented his age and health, his declarations cannot be received in evidence to prove the truth of the representations; but, after proof has been introduced tending to show his age or health was different from what he represented it to be, such declarations may be received to show that he had knowledge of his age and condition, and fraudulently misrepresented them.

(For other cases, see Evidence, Cent. Dig. §§ 989-993; Dec. Dig. § 252.)

3. APPEAL AND ERROR—HARMLESS ERROR—EVIDENCE.

In an action on a life insurance policy, declarations which were not distinctly remembered by the witness, made in a casual conversation by the insured before he had taken out the insurance, that he could not get any insurance on account of his health, and that he had taken all kinds of medicine from all kinds of doctors, if admissible, were not of sufficient importance to warrant a reversal of a judgment for plaintiff for their exclusion.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.)

4. EVIDENCE—DECLARATIONS—VERBAL ADMISSIONS.

Where declarations were made in a casual conversation five or six years before the witness testified and they appeared not to have been distinctly remembered or precisely identified, it cannot be said the trial court erred in rejecting them.

(For other cases, see Evidence, Cent. Dig. §§ 1019-1021; Dec. Dig. § 262.)

Error to Law and Equity Court of city of Richmond.

Action by Mrs. F. O'Grady against the Metropolitan Life Insurance Company of New York. Judgment for plaintiff, and defendant brings error. Affirmed.

Wellford & Taylor, of Richmond, for Plaintiff in Error.
Meredith & Cocke, of Richmond, for Defendant in Error.

* Decision rendered, Jan. 15, 1914. 80 S. E. Rep. 743.

FIRE, TORNADO, ETC.**SUPREME COURT OF CALIFORNIA.**

SHARMAN

vs.

CONTINENTAL INS. CO. OF CITY OF NEW YORK. (S. F. 6,495.)*

1. INSURANCE — FIRE INSURANCE — SALE AND UNCONDITIONAL OWNERSHIP.

Though it be not recorded one who has made a contract of sale of property, on which the purchaser has made payment, and under which he has entered into possession, is not the sole and unconditional owner, as required by a fire policy thereon, taken out by him.

(For other cases, see Insurance, Cent. Dig. §§ 601-635; Dec. Dig. § 282.)

2. INSURANCE — FIRE POLICY — WAIVER OF CONDITION — POWER OF SOLICITING AGENT.

Condition of a fire policy that it shall be void if insured be not the sole and unconditional owner, cannot be waived by knowledge and representation of a mere soliciting agent; it being only a general agent who can waive conditions, notwithstanding the provision of the policy that no condition of it can be waived by any agent except by indorsement thereon.

(For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. § 378.)

In Bank. Appeal from Superior Court, city and county of San Francisco; E. N. Rector, Judge.

Action by Thomas L. Sharman against the Continental Insurance Company of the city of New York. Judgment for plaintiff, and defendant appeals. Reversed.

Charles Tupper King, of San Francisco, for Appellant.
Myrick & Deering and James Walter Scott, all of San Francisco,
Amici Curiae.

James W. Cochrane, of San Francisco, for Respondent.

LORIGAN, J.

This action was brought to recover \$1,500 on a fire insurance policy. Plaintiff had judgment, and defendant appealed therefrom on the judgment roll and a bill of exceptions. The District Court of Appeal for the First Appellate District affirmed the judgment, and a further hearing was granted by this court.

The execution and delivery of the policy on August 11, 1908, and the destruction of the insured building on April 3, 1909, were facts not disputed. It was further admitted that a written and signed application by plaintiff for the insurance in question

* Decision rendered, Jan. 16, 1914. 138 Pac. Rep. 708.

stated, among other things, that plaintiff was the sole and unconditional owner of the property insured at the time the application for insurance thereon was made. The policy of insurance was in the ordinary form, and contained the covenants and conditions usually found in fire insurance policies. Among other stipulations and conditions was one that "this entire policy shall be void (a) if the interest of the assured in the property be not truly stated herein, * * * or (b) if the interest of the assured be other than unconditional and sole ownership." It contained, also, the further provision that: "This policy is made and accepted subject to the foregoing stipulations and conditions, printed on this and the following pages, which are hereby made a part of this contract, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of the company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached."

The main defense asserted and relied on by defendant was that plaintiff had not truly stated his interest in the property in his application for insurance; that he was not then, nor at the time of the fire, the sole and unconditional owner of the insured property. It introduced evidence upon the trial in support of this defense, and therefrom the trial court made findings that on April 30, 1908 (several months prior to the application for the issuance of the policy), plaintiff and one R. S. Cochran made and entered into a contract in writing by which plaintiff agreed to sell and Cochran to buy the property described in the policy of insurance for \$2,000, of which \$100 was to be paid down, the balance in installments of \$50 a month, with interest; that in pursuance of said contract Cochran, on July 15, 1908, went into possession of the property insured, and continued in possession thereof until it was destroyed by fire. From other evidence addressed to this matter, the court further found that the said contract of sale between plaintiff and Cochran was never recorded, that the record title of the property stood at all times in plaintiff, and that Cochran, after paying the first \$100 and two installments of \$50 had not made any further payments on account of such contract of sale. The court further found that said insurance was solicited and procured from plaintiff for defendant by one Wade, a soliciting agent of the defendant; that he drafted and prepared the agreement between plaintiff and

Cochran; that subsequently he prepared, and drafted, and delivered to defendant the written application for insurance signed by plaintiff, which contained the statement that plaintiff was then the sole and unconditional owner of the property; that, in preparing and drafting said application signed by plaintiff, Wade advised and assured the latter that it was proper and correct for said application to so state that the plaintiff was the sole and unconditional owner of said property.

The trial court on these findings concluded, as a matter of law, that, at the time plaintiff made his application for insurance and the policy was issued to him, and at the date of the destruction of the property by fire, he was the sole and unconditional owner of said property; that Cochran never acquired any right, title, or interest in said property or any insurable interest whatever; that defendant was not prejudiced by the statement in the application of the plaintiff that he was the sole and unconditional owner of the property, or by the failure to or the omission therefrom of any reference to the agreement between plaintiff and Cochran; that, if said omission constituted a breach of the insurance contract, it was waived by defendant; that Wade, when he prepared the application for insurance signed by plaintiff, delivered it to the defendant, and the policy so issued by defendant thereon to the plaintiff was delivered to him as the agent of the defendant acting as such within the scope of his apparent authority; that the representations made by Wade to plaintiff in connection with said insurance were and constituted in law the representations of defendant, and binding upon it, notwithstanding the limitations of said agent's authority contained in said policy of insurance of which plaintiff had no notice.

The appellant not only attacks these findings of facts as not sustained by the evidence, but further insists that, if they are so sustained, still the conclusions of law which the court drew from them and the judgment which it entered thereon were erroneous.

These points made by appellant were considered and disposed of in its opinion by the District Court of Appeal when this matter was before it. While we do not agree entirely with the conclusion of the District Court on the several points involved in this appeal, we agree with it that the trial court was in error in holding from the findings made by it on that matter that plaintiff was, as a matter of law, the sole and unconditional owner of the insured property when he made his application therefor and obtained the policy of insurance.

In considering and sustaining the claim of the appellant on this point, the court said: "The findings of the trial court with reference to the execution and existence of the contract of sale between plaintiff and Cochran, coupled with the further finding that Cochran had partially performed his contract, had actually

entered into the possession of the property prior to plaintiff's application for insurance, are, as a matter of law, inconsistent with the conclusion that plaintiff was the sole and unconditional owner of the property at the time he made application for the insurance, and at the time of the fire. The findings of the trial court upon this phase of the case do not warrant or support the conclusion of law deduced therefrom that Cochran had no insurable interest at any time in the insured property. * * * The admitted execution of the contract of sale between plaintiff and Cochran, coupled with the partial payment of the purchase price and actual possession by Cochran of the property sold, constituted a subsisting and valid contract of purchase and sale as between the parties thereto, notwithstanding the fact that the contract had not been recorded, or that Cochran had not completed his payments thereunder. Cochran, as the vendee in possession under a valid and subsisting contract of purchase and sale, might, upon tender and completion of the payments due from him, have specifically enforced the contract, and therefore, at the time of plaintiff's application for insurance, and at the time of the fire, Cochran was the owner and holder of an equitable title in the insured property. *Finkbohner vs. Glens Falls Ins. Co.*, 6 Cal. App. 379 [92 Pac. 318]; *McCullough vs. Home Ins. Co.*, 155 Cal. 659 [102 Pac. 814, 18 Ann. Cas. 862]. * * * Notwithstanding the fact that the plaintiff's interest was not that of a sole and unconditional owner within the meaning of the forfeiture clause of the policy under discussion, he did have an insurable interest in the property sufficient to validate the contract of insurance, and support an action thereon. Civ. Code, §§ 2546, 2547; *Breedlove vs. Norwich, etc., Ins. Co.*, 124 Cal. 164 [56 Pac. 770]; *Sharp vs. Scottish Union*, 136 Cal. 542 [69 Pac. 253, 615.]"

But this erroneous conclusion by the trial court on the question of ownership of the property would not warrant a reversal, if the finding of the court upon the agency of Wade and the conclusion of law drawn by the court therefrom can be sustained.

Appellant attacks this finding as not supported by the evidence, and further contends that, even if the evidence does not sustain it, nevertheless the conclusion of law which the court adduces therefrom was erroneous.

As to such agency: The evidence shows that Wade was never the actual agent of the defendant. He was a real estate agent and insurance broker, and in his latter capacity solicited insurance from the public. He had a list of insurance companies, including the defendant company, with which he placed such insurance as he might obtain. These companies paid him a percentage commission. As far as defendant was concerned he was never actually appointed as an agent for such purpose. His only relation to it was that usually arising from insurance brokerage.

namely: That, when he presented an application for insurance to it, if it elected to issue a policy, it paid him a brokerage commission for placing the risk for it. His connection with the defendant only existed during the negotiations of placing any insurance he might procure with it, the delivery of the policy, the payment of the premium, and the brokerage commission. When this was completed, all connection between them was at an end.

But it is claimed that, though the evidence may not show that Wade was the actual agent of the defendant, still the finding is supported under the evidence which shows that he was the ostensible agent of defendant, and as such prepared the application for insurance, knew the true title of the respondent in the insured property, represented to him that it was unnecessary to mention in the application the existence of the contract of conditional sale to Cochran, that this was knowledge by the agent of a matter materially affecting the contract of insurance which he was making for the defendant, and was notice to the defendant itself, and operated as a waiver of a condition which otherwise might be relied on by defendant to defeat the policy.

The finding in support of ostensible agency is based upon the following facts: That, covering a period of several years preceding the application for the policy here in question, Wade had insured four separate pieces of property of plaintiff, placing the insurance with defendant; that, while he had on his list a number of companies for which he placed risks, he never insured the property of plaintiff in any other company than that of defendant; that, in soliciting insurance to be placed with the defendant company, he delivered its circulars to persons he approached, and distributed other printed matter of the defendant; that he placed all the insurance he could with defendant; that, in each instance where an application for insurance on the property of the plaintiff was presented to defendant, it accepted the written application prepared by Wade, executed the policy of insurance thereon, and delivered it, including the one here in question to Wade, who in turn delivered it to plaintiff; that plaintiff paid the premiums to Wade on these policies, who paid them to defendant, and out of it defendant paid Wade a commission.

[2] The contention of the appellant, as it has been said, is that this evidence is insufficient to sustain the finding of even ostensible agency, and that, if it was sufficient, still that under the express terms of the policy limiting the power of its agents the knowledge or conduct of Wade was not binding on the company, nor constituted a waiver of the conditions of the said policy, and the conclusion of the trial court that they were is not correct.

We are satisfied that this last contention of the appellant must be sustained. Hence it is unnecessary to determine whether the recited evidence does or does not sustain the finding on the theory of ostensible agency. In fact under the provision of the

policy issued by defendant it is immaterial whether Wade was the actual agent of the defendant company or its ostensible agent.

The policy which was delivered by the defendant and accepted by the plaintiff constituted the contract between them. It was accepted subject to the condition that it was void if the stipulation therein contained that plaintiff was the sole and unconditional owner of the property was untrue. It further provided that "no officer, agent, or other representative of this company shall have power to waive any provision or condition in this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto," and as to such provisions or conditions such officer, agent, or representative shall not be deemed to have waived them, unless such waiver be written upon or attached to the policy.

An insurance company like any other principal acting through agents, may limit their powers, and this was done by defendant by clear and plain terms in the policy here in question. When plaintiff accepted it, it became the contract between him and the company, and he was charged with knowledge of its terms, among others the limitations upon the power of the agent of the company. *Westerfield vs. New York Life Ins. Co.*, 129 Cal. 68, 58 Pac. 92, 61 Pac. 667; *Cayford vs. Metropolitan Life Ins. Co.*, 5 Cal. App. 715, 91 Pac. 266; *Blunt vs. Fidelity & Casualty Co.*, 145 Cal. 268, 78 Pac. 729, 67 L. R. A. 793, 104 Am. St. Rep. 34.

Provisions in policies limiting the authority of agents to bind the company by waiver of conditions therein have been the frequent subject of consideration by the courts. It is held with practical unanimity that, notwithstanding such limitations upon the authority of these agents, conditions in policies may be waived by some agents of the company, and under some circumstances will be deemed to have been waived notwithstanding the method provided for in the policy has not been pursued. But the authority of an agent to effect the waiver in the face of such a limitation as here is not vested in every agent who may represent the company. Unless such authority be given to some particular agent to do so, then, as a general rule, it is only agents of the company who are empowered to issue and deliver policies who may be regarded as having the power to waive conditions and forfeitures. They are the general agents of the company, and vested with full authority to consummate the contract of insurance, and are deemed, as such representatives, to have the same power to waive conditions as the companies themselves. As to the character of agents authorized to waive such conditions, it is said, in 3 Cooley's Briefs on Insurance, p. 2480: "This rule includes all persons empowered to conclude contracts of insurance without first referring the negotiations to their principals, such as those which have 'full power to effect contracts of insurance, to fix rates of premiums, to consent to changes, to make

indorsements, and to cancel policies.' " It may also include those declared by statute of a state to be general agents.

It is not claimed here that the representations or statements of Wade were communicated to the general agent of the defendant, or that he had any knowledge in fact of the existence of the conditional contract of sale between plaintiff and Cochran, or that the statement in the policy that plaintiff was the sole and unconditional owner of the property insured was not true. The contention solely is that, because Wade was agent of the company—the ostensible agent at least—his knowledge bound the defendant. But Wade was merely a soliciting agent of the defendant. He had no authority, actual or ostensible, to waive conditions in the policy. This was not within the scope of any apparent authority he possessed, and his knowledge of the true condition of the title of plaintiff, not communicated to the general agent of the company, was not the knowledge of the latter. The extent of his duties was merely to solicit insurance, and send in applications therefor to the general agent of the defendant. He had no authority to consummate the contract of insurance, and issue the policy, and it is only an agent of this character who could waive conditions notwithstanding the apparent limitations of the power of all agent to waive the conditions or stipulations of a policy. A soliciting agent could not. Iverson vs. Metropolitan Life Ins. Co., 151 Cal. 746, 91 Pac. 60⁹, 13 L. R. A. (N. S.) 866; Fidelity, etc., Co. vs. Fresno Flume Co., 161 Cal. 466, 119 Pac. 643, 37 L. R. A. (N. S.) 322; Mackintosh vs. Agricultural Fire Ins. Co., 150 Cal. 440, 89 Pac. 102, 119 Am. St. Rep. 234; Raulet vs. Northwestern Ins. Co., 157 Cal. 213, 107 Pac. 292.

The judgment is reversed.

We concur: Henshaw, J.; Melvin, J.; Shaw, J.; Angelotti, J.

SUPREME COURT OF IOWA.

TEASDALE.

vs.

CITY OF NEW YORK INS. CO.*

1. INSURANCE — LOSS — ADJUSTMENT — AUTHORITY OF AGENT.

Where T. was recognized by defendant insurance company as its representative in dealing with plaintiff in adjusting a loss, the whole matter having been placed in his hands, and, on his production as a witness for defendant, he testified directly to his official connection with the

* Decision rendered, Feb. 11, 1914. 145 N. W. Rep. 284.

transaction, without any denial or repudiation of his authority by defendant, the latter could not sustain the contention that he had no authority to waive a clause of the policy requiring production of verified proofs of loss within sixty days.

(For other cases, see Insurance, Cent. Dig. §§ 1374-1377; Dec. Dig. § 556.)

2. INSURANCE — FIRE POLICY — LOSS — VERIFIED PROOFS —WAIVER.

A fire policy required verified proof of loss within sixty days thereafter. A fire having occurred November 11, 1911, plaintiff promptly reported the same to defendant's agent, who immediately filed proofs on defendant's blanks, but without an accompanying affidavit. The matter was placed in the hands of an adjuster, who led plaintiff to believe that the loss would be adjusted, and as late as January 13, 1912, two days after the sixty-day period had elapsed, defendant's home office informed plaintiff's counsel that it was writing the adjuster on the subject and that he "would doubtless take the same up with them." On February 5, 1912, the adjuster ended the negotiations by declaring for the first time that it would take no action regarding a settlement stating as the sole reason therefor that the fire was of incendiary origin and nothing had been done to explain the matter. Held, that such acts constituted a waiver of plaintiff's obligation to furnish verified proofs within sixty days.

(For other cases, see Insurance, Cent. Dig. §§ 1382-1390, 1405; Dec. Dig. § 558.)

Appeal from District Court, Monroe County; D. M. Anderson, Judge. Action at law upon a policy of fire insurance. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

John F. Abegglen, of Albia, for Appellant.
John R. Price, of Albia, for Appellee.

WEAVER, J.

On October 26, 1911, the defendant insurance company issued its policy to the plaintiff, indemnifying him against loss or damage by fire for a period of one year upon a certain stock of goods and store fixtures in a building situated in the village of Griffinville, Monroe County, Iowa. Thereafter, on November 11, 1911, and while said policy was in full force and effect, the property so insured was destroyed by fire. Among other stipulations of the policy, it was provided that in case of loss the insured should within sixty days give to the company written notice thereof, accompanied by affidavit as to how the loss occurred and the extent thereof. This action on said policy was begun August 30, 1912. The petition as finally amended alleges the issuance of the policy and the fact of the loss of the insured property by fire and that written notice of such loss was promptly given to the company. It also pleads certain correspondence had with the company and its agents and certain conduct and representations on their part as a waiver of the requirement that such notice be accompanied by an affidavit or other proof of loss, and, averring the failure of the defendant to make payment of said loss, demands judgment for recovery of his damages. Answering this

claim, defendant admits the issuance of the policy, and that it received notice of the loss, but denies that it ever waived the requirement of the policy for an affidavit or sworn proof of such loss. It further pleads affirmatively the requirement of the policy for proofs of loss within sixty days after the fire, and alleges that such proofs were not furnished until long after such period had expired, for which reason plaintiff neither acquired nor has any right of action upon said policy.

The evidence tends to show that the policy was issued to plaintiff by one Sloan, then acting as defendant's agent, and that immediately after the fire plaintiff went to said agent, informed him to report it to the company, which he promised to do and did do, sending the notice upon blanks prepared by the company for such purpose, one being sent to the home office and one to its special agent, George W. Tones, having more immediate charge of the business in that territory. The notice clearly specified the number of the policy, its date, the name of the assured, the location of the property, the kind of property, the amount of insurance, the extent of the loss, and that the origin of the fire was unknown. No affidavit accompanied it. Receipt of the notice was acknowledged by both Tones and the home office. Tones visited the local agent once or twice after the notice of loss. Sloan's testimony is to the effect that Tones promised to return and meet the plaintiff with a view to adjusting or settling his claim and named a day for that purpose. This appointment was reported to plaintiff, who appeared at the agent's office at the time so fixed, but Tones did not appear. Referring to this same loss, Tones wrote Sloan under date of November 20, 1911, as follows:—

"Your favor of the 15th inst. came to my attention this morning and I see that the fire referred to occurred on the 11th which was quite a while ago. I had already made plans, depending on a telegram, to meet a man in Davenport on Wednesday morning and I received his telegram that he could be there. Therefore I will be unable to reach you on this matter until the latter part of this week when I shall be pleased to see you.

"Yours truly, Geo. W. Tones."

Ten days later, apologizing for his nonappearance, Tones wrote again:—

"I suppose you think I am very careful of my engagements, but learned that two other adjusters, also interested in the same fires expected to take the matter up the latter part of this week, so have delayed it and because further I was called on another matter. So will let you know later just when to expect us. Possibly this week yet.

"Yours, Geo. W. Tones."

All these matters were reported to plaintiff, who relied thereon and took no further steps in the matter for some time, except to

call frequently on the local agent and urge action upon his claim. Early in January, 1912, plaintiff consulted counsel, who wrote directly to the home office calling attention to the loss, to the fact that Tones had come to Griffinville with reference to the matter, and had promised to return for its adjustment, but had failed to do so, and asked that immediate attention be given to the claim. This letter the company answered as follows under date of January 13, 1912: "We are in receipt of your favor of the 8th inst. regarding claim of Mathew Teasdale under policies 5090 and 5095, Albia, Iowa, agency and in reply beg to state that we are today writing our special agent Mr. Geo. W. Tones at Des Moines, Iowa, regarding the matter, and he will doubtless take the same up with you." Tones did not again "take up" the matter with counsel or with plaintiff, but on February 5, 1912, responding to an inquiry from the local agency, he wrote: "Gentlemen: Your favor regarding Mathew Teasdale, received. As you know, we have done nothing from the first regarding this loss as to settlement, and do not expect to. There is no question, it appears, in the mind of Mr. Teasdale but that this was of incendiary origin, and nothing has been done to clear the matter up, so that as stated already we have taken no action whatever regarding its settlement, and do not intend to." This is substantially the entire record. The insurance is not denied and a total loss is shown without dispute. There is no issue or claim of any default, omission, or misconduct of the plaintiff, preceding the loss, by which his insurance was forfeited. The sole defense is based upon his failure to present formal proofs of such loss in strict compliance to a condition of the policy.

Assuming for the present that such defense may be technically good and perfect, if the default be admitted and no fact be shown to avoid its defect, it is a defense which does not appeal to the favor of courts, and a forfeiture so claimed will not be enforced if there be any reasonable ground on which to find that the condition has been waived. It is to be remarked in the first place that it is open to grave doubt whether the policy makes the failure of the insured to furnish formal proofs in strict accordance with its terms operate as a forfeiture of the insurance. There are several clauses of the contract which specify in clear terms conditions, a violation of which shall render a policy "void," and other specific conditions upon which the company "shall not be liable for loss," but none of these make reference to proofs of loss. The clause pleaded and relied upon, which is separately stated and numbered, makes it the duty of the insured, when the loss occurs, to protect the property from further damage, put it in good order, and within sixty days to furnish the company written notice thereof, with affidavit stating the facts of the loss and its extent, but contains no statement or declaration that a failure in any of these respects shall defeat the right of

action for a recovery upon the policy. But, waiving this question and accepting for the purposes of this case the theory of counsel that a failure to comply with this provision if not waived is an absolute defense, we have still the question whether, under the conceded facts, the jury were not justified in finding that there was such a waiver. It is to be said that the defense pleaded seems to be based entirely upon the provisions of the policy, and not upon any failure to comply with statutory regulations as to proofs of loss.

[1] Counsel for appellant meets this proposition from two angles. In the first place it is strongly urged that the evidence is insufficient to find that Tones had any authority in the premises, and therefore no waiver can be predicated on his acts in reference to the matter. It appears to us that this a very extreme position. That he was an agent of the company is shown by its own correspondence and by the evidence offered in its own behalf on the trial. That it recognized him as its representative in dealing with the plaintiff respecting this loss is shown by its written statement to plaintiff's counsel that its special agent George W. Tones would take the matter up with them. It is clear that the whole matter was placed in his hands. He alone took any action in the matter. It was he who came to Griffinville in response to the notice. He is produced as a witness for the company and as such reveals his direct and official connection with the transactions without denial or repudiation of his authority on the company's part, and it is he who, after the sixty days had expired, put an end to the plaintiff's hopes of adjustment by sending word to the local agent that "we do not intend" to take any action for the settlement of the claim. Not only is the agency and authority sufficiently shown, but, as we view the record, a finding of the jury to the contrary would be so clearly without support in the testimony that it could not be permitted to stand.

[2] It is next argued that the facts which the evidence tends to establish are insufficient to constitute a waiver of the defense. Such is not our view of the record. The case is fairly ruled by decisions of which *Griffith vs. Ins. Co.*, 143 Iowa, 88, 120 N. W. 90, is a leading example. In all essential respects, the facts in the cited case and in the one at bar are quite parallel, and the equities of the insured persons are equally apparent. Here, as there, the plaintiff reported his loss to the local agent with request that a proper notice be given the company, and such notice was given by the agent, but no formal proofs of loss were ever furnished. Here, as there, the company gave no hint of objection to the sufficiency of the showing. Here, as there, the plaintiff, believing that he had done all that would be required of him until an adjuster arrived, was tolled along by the promises of the early coming of such an agent until the sixty-day period had safely expired, when the company for the first time revealed its

true purpose and intent by a distinct refusal to consider the claim at all. In sustaining a recovery under such circumstances, we said: "Proofs of loss required by the policy of insurance may be waived by a shuffling, tricky, or evasive course of conduct on the part of the company, amounting neither to an actual denial or a distinct recognition of liability, yet such as to lead a reasonably prudent man to believe that proofs of loss are not to be required." See, also, Nichols vs. Ins. Co., 125 Iowa, 262, 101 N. W. 115; Harris vs. Ins. Co., 85 Iowa, 238, 52 N. W. 128; Morey vs. Laird, 108 Iowa, 670, 77 N. W. 835; Pringle vs. Ins. Co., 107 Iowa, 742, 77 N. W. 521; Green vs. Ins. Co., 84 Iowa, 135, 50 N. W. 558; Lake vs. Ins. Co., 110 Iowa, 473, 81 N. W. 710.

To say the very least of the conduct of the company in this case, it was evasive. If, as indicated in Tones' letter of February 5, 1912, it had never been the intention of the company to pay the loss, ordinary candor required that it should have said so in response to plaintiff's repeated requests for an adjustment; and if, having been informed of a total loss, it desired other or additional proof, then, when it appeared that plaintiff was acting in the belief that he had done all that would be required of him until the adjuster had come and made investigation according to promise, fair dealing demanded that he should be so informed. Plaintiff did give and defendant did receive notice of the loss and of its character and amount. The only omission of which advantage is sought to be taken is in the failure to accompany it with a sworn statement. Speaking of a similar situation in Nichols vs. Ins. Co., 125 Iowa, 268, 101 N. W. 118, we said: "If defendant desired this [affidavit] it should in all fairness have requested it, and, as it did not do so, this defect was waived." So in Green vs. Ins. Co., 84 Iowa, 137, 50 N. W. 559, where the insured failed to furnish the required affidavit, but the company responded to an unsworn statement by promising to send an agent to investigate the matter, we said that: "If there had been any objection regarding the letter as proof of a loss, the plaintiff was authorized to presume that defendant would make such objection known. Good faith required that, if proofs were not satisfactory, notice should be given the assured * * * within at least a reasonable time. The plaintiff was authorized to rest upon the presumption that the defendant would act in good faith, and give him notice if the letter was not regarded as sufficient proof of loss. The defendant was bound to know that the plaintiff would so regard its failure to make objection to the insufficiency or want of proof." The conclusion from a reading of the record is quite irresistible that defendant must have known that plaintiff was proceeding upon the understanding that he had done all he was required to do and was waiting the appearance of an agent or adjuster as promised. The defendant neither di-

rectly nor indirectly asked or demanded of him other notice or proof of loss, but gave him to understand that its agent would visit the place and take up the matter of adjusting his claim. As late as January 13, 1912, two days after the sixty days had elapsed, the home office informed counsel that it was then writing their Mr. Tones on the subject of the claim, and that he would "doubtless take the same up" with them. And, even when on February 5, 1912, defendant's agent put an end to the negotiations by declaring for the first time that it would "take no action whatever regarding the settlement" of the claim, such refusal was not based upon plaintiff's failure to make formal proof, but expressly justified its attitude upon the suggestion that the fire "was of incendiary origin, and nothing had been done to clean the matter up." Indeed, so far as this record is concerned, the insufficiency of the proof of loss was never advanced or relied upon as a defense to the claim until it was pleaded in the answer in this action. That in view of all these facts the jury was justified in finding that the failure to furnish formal proofs had been waived is too clear for controversy, and there was no error in denying defendant's motion for a directed verdict.

Some objections are raised to the giving of certain instructions and to the refusal of others requested. The points made in most of these objections are ruled adversely to the appellant by the conclusions already announced. There was some evidence tending to show that Tones, on one of his visits to the place after the fire, did make inquiry and investigation into the question whether plaintiff had not been conducting an unlawful business in the burned building, and that Tones was raising some objection to the claim on the theory that the fire was of incendiary origin. In its instructions, the court said, among other things, that, if Tones did so act and that plaintiff was informed thereof and waives thereby to believe that no objection was being made because of the lack of final proof of loss, then a finding of waiver of such proof would be justified. This charge is objected to as submitting to the jury a question not raised by the pleadings. In our judgment, the issues made by petition and answer are broad enough to cover this proposition, and the exception must be overruled. Of the requested instructions it is sufficient to say that so far as they state correct propositions of law, they are sufficiently covered by the charge of the court.

There is no error shown which will justify us in interfering with the judgment of the district court, and it is hereby affirmed.

COURT OF APPEALS OF KENTUCKY.

GRESHAM

vs.

NORWICH UNION FIRE INS. SOCIETY.*

**1. INSURANCE—AGENTS—PAROL CONTRACT OF INSURANCE
—AUTHORITY TO MAKE.**

An insurance agent, having authority to solicit insurance, accept risks, to agree on and settle the terms of and issue and renew policies, may make a preliminary parol contract binding on the insurance company either to issue a policy or renew one about to expire.

(For other cases, see Insurance, Cent. Dig. §§ 203-209; Dec. Dig. § 131.)

2. INSURANCE — POLICY — CONTRACT TO RENEW.

While a parol contract to renew a fire policy need not be as certain and definite as an agreement to issue a policy, yet there must be a definite agreement to renew.

(For other cases, see Insurance, Cent. Dig. §§ 203-209; Dec. Dig. § 131.)

**3. INSURANCE — FIRE POLICY — PAROL AGREEMENT TO
RENEW—EVIDENCE.**

Evidence *held* insufficient to establish a parol agreement to renew an existing fire policy on expiration thereof.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

4. INSURANCE—RENEWAL—CUSTOM.

The fact that it was customary for defendant's agent to renew plaintiff's policy and to wait several months before collecting the premiums was relevant only to the question of waiver of payment of premiums and was not of itself sufficient to constitute a contract to renew.

(For other cases, see Insurance, Cent. Dig. §§ 203-209; Dec. Dig. § 131.)

Appeal from Circuit Court, Lyon County.

Action by E. L. Gresham against the Norwich Union Fire Insurance Society. Judgment for defendant, and plaintiff appeals. Affirmed.

L. H. James, of Marion, and Hodges & James, of Eddyville, for Appellant.

J. C. Gates, of Princeton, and Willard Utley, of Eddyville, for Appellee.

CLAY, C.

About April 28, 1910, E. L. Gresham purchased from C. Armstrong a house and lot in Eddyville, Ky. At the time of the conveyance, Armstrong was carrying a \$1,000 policy of insurance on the house. The policy was issued by the Norwich Union Fire Insurance Society, of which N. W. Utley was the agent at Eddyville. The policy was dated February 19, 1910, and by its terms

* Decision rendered, Feb. 11, 1914. 163 S. W. Rep. 214.

expired February 9, 1911. When the sale was effected, the policy was assigned by Armstrong to Gresham, and the transfer was approved by the usual indorsement on the policy made by the company's agent. At the time of the assignment, Gresham was carrying a \$600 policy of insurance issued by the Pennsylvania Fire Insurance Company, and expiring on December 30, 1910. N. W. Utley, the agent of the Norwich Union Fire Insurance Society, was also the agent of the Pennsylvania Fire Insurance Company. On May 29, 1911, more than three months after the expiration of the policy issued by the Norwich Union Fire Insurance Society, the dwelling house covered by that policy was destroyed by fire. Gresham brought this action against the company to recover the sum of \$1,000, claiming that prior to the expiration of the policy he entered into a parol agreement with the company's agent to renew the policy upon its expiration. At the conclusion of plaintiff's evidence, the trial court gave a peremptory instruction in favor of the defendant. Plaintiff appeals.

While plaintiff testified that defendant's agent agreed either during the month of October or November, 1910, to renew the policy on the same terms and conditions as the original policy, yet, when asked by counsel to detail the exact conversation which took place between him and the defendant's agent, he made the two following statements: "He was trying to write me an additional thousand; wanted to write an additional thousand after I had repaired the house. I told him I didn't care to take any more; that I didn't feel like I was able to take an additional thousand on the house; and he insisted that he should write an additional thousand on the house for me since I had repaired it. Then he rather insisted more that I should give him another thousand on it. He went on and asked me what I had on it. I told him, 'I have the thousand that you have and six hundred that Mr. Molloy has on the dwelling.' In our conversation there, he talked and wanted to write this additional thousand, I said, 'Mr. Utley, I don't care to take another one, because I am not able to pay for an additional thousand, because I am carrying as much as I feel like I am able to pay on the two buildings.' I said, 'You may carry the two policies you are now carrying.' He said, 'Certainly. I don't want to lose what I have got, if I can't get any more.' He was carrying two thousand for me then, one on the house and one on the stable." "I met Mr. Utley on the sidewalk, and I wanted to borrow some money; that is what brought up the conversation. I asked him if he had \$500 he wanted to loan me, but he said he did not; but he said, 'I am figuring on selling my farm in a few days, and, if I do, I expect I can have you have it.' He turned right around and asked me about how much insurance I was carrying down there. I told him I was carrying the thousand he had and six hundred Mr. Molloy had. He wanted to write me an additional thousand. I told him

didn't feel like I could carry more than I was paying for then; that I knew I needed it, but didn't feel like I could pay for more than I was carrying then. I said, 'I want you to keep up the two policies you have.' He says, 'Certainly; I want to do that, if I don't get anything more. I don't want to lose anything I have got.'"

When asked by the court to tell exactly what the agent said, plaintiff answered as follows: "He said he wanted to carry the two policies on; he didn't want to lose any if he didn't get any more. The two policies he was carrying was the one on the residence and the other on the stable, that we were talking about. They were to be carried for the same amount, and he said he certainly wanted to do that; he didn't want to lose anything he had."

Plaintiff further testified that after the fire he met Mr. Utley, the agent, and that the latter asked him where the Norwich Union policy was. Plaintiff replied, "It is in the bank, I suppose." He looked for the policy at the bank. The old policy was found, but no renewal policy was there. He then said to Mr. Utley, "You know I told you to keep up those two policies." Utley replied, "It looks like I would have done it." Plaintiff also testified that Utley had been carrying insurance for him from 1900 to 1910. Utley always wrote the policies, renewed them whenever he got ready, and came to plaintiff for the money when it suited him. Frequently there would be a delay of two or three months, and sometimes as much as six months, before Utley would ask for payment of premiums. Plaintiff never knew that the policy had not been renewed, but relied on his agreement with Utley to have it renewed. On cross-examination it developed that the policy in the Pennsylvania Insurance Company was renewed and delivered to plaintiff. Sometimes he took the policies when they were issued, and sometimes he did not. Never remembered of having left a policy in the possession of Utley after he had paid the premium.

Another witness for plaintiff testified that the morning after the fire Utley said, in his presence, that he was carrying \$2,000 on plaintiff's property. Another witness stated that he had heard Utley say after the fire he thought he had a thousand on the home place as well as a thousand on the livery stable until he examined his records. Still another witness testified that Utley stated in his presence after the fire that Mr. Gresham was carrying \$2,000 insurance. The cashier of the bank where the original policy was deposited stated that after the fire plaintiff and Mr. Utley came in there looking for the policy. He found the old policy, but no renewal policy.

[1] It is well settled that an insurance agent, having authority to solicit insurance, accept risks, agree upon and settle the terms of insurance, and to issue and renew policies, has the authority

to make a preliminary parol contract, binding on his principal, either to issue or renew a policy about to expire. *James McCabe et al. vs. Aetna Ins. Co.*, 9 N. D. 19, 81 N. W. 426, 47 L. R. A. 641; *Security Fire Ins. Co.*, 7 Bush, 81, 3 Am. Rep. 301; *Stickley vs. Mobile Ins. Co.*, 37 S. C. 56, 16 S. E. 280, 838; *Cohen vs. Continental Ins. Co.*, 67 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24; *More vs. New York Bowery Ins. Co.*, 130 N. Y. 527, 29 N. E. 757.

[2] While it is true that the agreement to renew a policy does not have to be as certain and definite as to its terms as an agreement to issue a policy, in view of the fact that such an agreement will be presumed to have reference to the terms and conditions of the existing insurance (*Western Home Ins. Co. vs. Hogue*, 41 Kan. 524, 21 Pac. 641; *Franklin Fire Ins. Co. vs. Massie*, 33 Pa. 221), yet the evidence should establish a definite agreement to renew. Here the alleged renewal contract was made either three or four months before the old policy expired.

[3] The conversation related principally to an increase of the insurance. After declining to take the additional insurance, plaintiff said to the agent, "You may carry the two policies you are now carrying." The agent replied, "Certainly; I don't want to lose what I have got, if I can't get any more." The word "renewed" was not used. Nothing was said about how long Utley was to carry the two policies. The contract between the parties depends on what was actually said, and not on the vague and indefinite conclusions not reasonably deducible from the words used. No time for carrying the policies being fixed, plaintiff would not have been bound to pay the premium on any renewal policy unless he had actually bound himself in some other way. On the other hand, the agent merely indicated his desire to keep the insurance he had, without obligating the company to renew the insurance upon its expiration. On the whole, we conclude that the language is too vague, uncertain, and indefinite to constitute a binding executory agreement to renew the policy in question.

[4] The fact that it was customary for defendant's agent to renew plaintiff's policies, and to wait several months before collecting the premiums, was admissible only on the question of waiver of prepayment of premiums. *Baldwin vs. Phoenix Ins. Co.*, 107 Ky. 356, 54 S. W. 13, 21 Ky. Law Rep. 1090, 92 Am. St. Rep. 362. A mere custom to renew will not of itself bind the company. There must be a contract to renew.

The evidence being insufficient to show a contract to renew, it follows that the trial court properly directed a verdict in favor of defendant.

Judgment affirmed.

COURT OF APPEALS OF MARYLAND.

NATIONAL UNION FIRE INS. CO. OR PITTSBURGH, PA.

vs.

BALTIMORE ASBESTOS CO., INC.*

1. INSURANCE—FIRE POLICIES—CANCELLATION.

Where notice to the insured is a condition precedent to the cancellation of a fire policy, notice to the broker who effected the insurance is not notice to the insured.

(For other cases, see Insurance, Cent. Dig. §§ 500-503; Dec. Dig. § 229.)

2. INSURANCE—FIRE POLICIES—CANCELLATION.

While an insured may ratify notice of cancellation given only to the broker who effected the insurance, there is no ratification where the broker did not secure any substitute policies, as was his custom in such cases, and the insured had no notice of the cancellation.

(For other cases, see Insurance, Cent. Dig. §§ 500-503; Dec. Dig. § 229.)

3. INSURANCE—FIRE POLICIES—PAYMENT OF PREMIUMS.

A fire company issued a policy on the 3d of July, and according to custom.

The premium was paid at the time, and the company's account was credited with it. Thereafter the fire company notified the broker of cancellation, which cancellation was ineffective, because no notice was given to the insured. *Held* that, as settlements were made between the broker and the company only every thirty to sixty days, the company could not escape liability for a fire which occurred within less than two months after the issuance of the policy on the ground of nonpayment of premiums upon the theory that the broker, upon notice of cancellation, by crediting himself with the amount of the premium as of the date of the issuance of the policy, deprived the company of any premium; it not appearing that payment was ever refused by the broker.

(For other cases, see Insurance, Cent. Dig. §§ 231-245; Dec. Dig. § 137.)

Appeal from Circuit Court of Baltimore City; Henry Duffy, Judge.

"To be officially reported."

Action by the Baltimore Asbestos Company, Incorporated, against the National Union Fire Insurance Company of Pittsburgh, Pa. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before Boyd, C. J., and Briscoe, Burke, Pattison, Urner, Stockbridge, and Constable, JJ.

John B. Deming, of Baltimore (Whitelock, Deming & Kemp, of Baltimore, on the brief), for Appellant.

Isaac T. Parks, Jr., and Clarence A. Tucker, both of Baltimore (Harry L. Price, and Harman, Knapp, Ulman & Tucker, all of Baltimore, on the brief), for Appellee.

STOCKBRIDGE, J.

In the spring of 1912 the Baltimore Asbestos Company was solicited by a Mr. Bokel, who was in some manner connected or

* Decision rendered, Dec. 19, 1913. 89 Atl. Rep. 408.

associated with the firm of A. Page Boyce & Co., insurance agents and brokers, for the insurance on the plant of the Asbestos Company at Revell, Md. In response to his solicitation, he was directed to place insurance thereon to the amount of \$11,600. At this interview Mr. Bokel said to Mr. Preston, who was acting for the Asbestos Company, that it would first be necessary for him to make an inspection and survey of the property, which he did on the day following and thereafter policies were issued to an aggregate amount of \$11,600—distributed among seven companies. At some later date, not precisely fixed, three of the companies which had originally underwritten a portion of the risk, viz., the General, the Duchess, and the Teutonia, gave notice of cancellation, in accordance with the terms of their policies, and their places were filled up through the agency of Mr. Bokel, by the Monongahela doubling the amount of its policy, and the balance being covered by a policy issued under date of July 3, 1912, by the National Union Company of Pittsburgh, the present appellant. Eight days later the following notice was sent by Mr. F. W. Widemeyer, the local agent of the appellant, to Mr. Bokel; but no notice was sent to the insured company:—

“National Union Fire Insurance Co. Pittsburgh, Pa., Agency at Baltimore, Md., July 11, 1912. Mr. William Boeckel, 216 E. German St., City—Dear Sir: We hereby give you notice that policy No. 355 of the Duquesne Underwriters’ Agency Department of National Union Fire Insurance Company, Pittsburgh, Pa., issued to you covering on Balt. Asbestos Co., Inc., situated at Revell’s Station, A. A. Co., Md., will be canceled five days from this date in accordance with its conditions as set forth in lines 51 to 55 thereof, and we further notify you that said company will not be liable for any loss or damage by fire to the property described in said policy after the expiration of five days as herein stated.”

Mr. Bokel testified that he gave verbal information of the receipt of such notice as to the Asbestos Company; but at what time he is unable to fix. The policy itself appears to have been at the time in the possession of Mr. Bokel, to whom it had been sent for the purpose of having an indorsement placed on it, that, in the event of loss, the insurance should be payable to a first and second mortgagee, as their interests might appear. The most definite approximation to a date when Mr. Preston had any notice whatsoever of a wish on the part of the appellant to cancel its risk appears in a letter from the Boyce Company to the Asbestos Company of July 15, 1912, in which, after referring to the request to have the mortgage indorsement placed on the policy, is the following: “The Duncan Underwriters have requested the cancellation of their policy which we have deliv-

ered, and the amount of which we will replace at the first opportunity."

To this letter, no reply appears to have been made. It also appears that, at some time after the receipt of the notice by Mr. Bokel, he wrote across the policy the words "canceled at date by company, full return premium," and on the 16th July the policy was physically delivered by the Boyce Company to Mr. Widemeyer, the agent of the insurance company. A fire took place on the premises of the Asbestos Company on the 15th of August, and, when notified of the loss, the National Union Company denied all liability.

In this proceeding the Asbestos Company seeks to require the insurer to surrender to the appellee, or bring into court, the policy, to have the cancellation indorsed on it, annulled, and the company required to pay its proper pro rata of the loss.

[1] The first point raised is in regard to the cancellation. There can be no question that the notice given was insufficient under the terms of the policy, if it was necessary that such notice be given by the insurer to the insured. American Fire Ins. Co. vs. Brooks, 83 Md. 29, 34 Atl. 373; German Fire Ins. Co. vs. Clarke, 116 Md. 622, 82 Atl. 974, 39 L. R. A. (N. S.) 829, Ann. Cas. 1913D, 488.

It is insisted, however, that the notice to Bokel was notice to the insured. Bokel was unquestionably the agent of the Asbestos Company for the placing of the insurance; but that fact did not invest him with any authority to receive notice of cancellation. "The rule of law in this regard is well settled. The notice must be given to the assured himself, or to some one duly authorized to receive it on his behalf. A broker or agent employed for the purpose of procuring insurance has no implied authority to cancel or to accept an operative notice of cancellation. On receiving the policies and transmitting them to the principal, his authority terminates. His duty is to get insurance for his customer, not to destroy it. Hence it follows reasonably that notice of cancellation by the company served upon such an agent of the insured is unavailing." Richards on Insurance Law, pp. 388, 389; Insurance Co. vs. Forcheimer, 86 Ala. 541, 5 South. 870; Mut. Ass'n Co. vs. Scottish Ins. Co., 84 Va. 116, 4 S. E. 178, 10 Am. St. Rep. 819; Grace vs. Insurance Co., 190 U. S. 278, 3 Sup. Ct. 207, 27 I. Ed. 932; Broadwater vs. Lion Fire Ins. Co., 34 Minn. 465, 26 N. W. 455; Green vs. Star Fire Ins. Co., 190 Mass. 586, 77 N. E. 649, and many others fully collected in Morris McGraw Woodenware Co. vs. German F. Ins. Co., 126 La. 32, 52 South. 183, 38 L. R. A. (N. S.) 623, 20 Ann. Cas. 1229.

[2] The effect of this well settled rule is sought to be obviated in several ways. It is, of course, true as laid down in numerous cases that an assured may ratify an unauthorized can-

cellation, if he accepts as a substitute a new policy in place of that attempted to be canceled. But that has no application in the present case, for the reason that no substitute policy was ever offered to and accepted by the Asbestos Company. On the contrary, Mr. Bokel was never able to proffer another policy as a substitute for that of the National Union Company. The letter of Mr. Bokel to the Asbestos Company, stating that the insurance company had requested a cancellation of the policy, made no mention of any notice or attempted notice under the terms of the policy, and the uncontradicted evidence is to the effect that Mr. Bokel was not given any authority either to cancel a policy or accept notice of cancellation.

It is further urged that Bokel was possessed of the authority by the course of dealing, both to procure insurance, accept notice of cancellation, and surrender a canceled policy. Many cases were cited with reference to this line of defense. All cases involving this question are dependent each upon its own particular facts, and it would serve no good purpose to renew them separately. Here, again, the facts as testified to do not bear out the contention of the appellant. The custom of business, so far as there can be said to have been one from the three instances of cancellation shown, was for Mr. Bokel to procure a substitute policy, take it to Mr. Preston, and exchange it with him for the policy desired to be canceled—a totally different procedure from what took place in this instance. It is apparently true that Mr. Bokel was in possession of the policy when he received the notice; but he was in possession of it for a distinct, definite purpose, wholly apart from any cancellation.

[3] The policy is also sought to be avoided upon the ground that the insurer had never received the premium therefor. There is no dispute that, at the time the insurance was originally placed, the Asbestos Company paid Boyce & Co. the full premiums upon the total amount of the risk underwritten, \$11,600. What was, if any, the regular course of dealing between the brokers, Boyce & Co. or Bokel, and the appellant? This is testified to by Mr. Widemeyer, and he is in no way contradicted upon this point. A card was kept upon which were noted the transactions between them, and settlements made at intervals of thirty or sixty days. The separate premiums upon each policy were not paid at the time of the issuance of the policy. Following this custom, there was noted on the card as of July 3d, the date of the issue of the policy, a debit, first against Boyce & Co., and then transferred to Bokel, of \$87, as and for the premium upon the policy involved in this case. Then, when the company reached a determination to cancel the policy, it credited that amount upon the card to offset the debit. There is no evidence to show that in this interval any of the regular periods for settlement had arrived, and that Mr. Bokel refused to make payment of the premium of this policy.

It is true that the credit is entered as of date of July 3d. Under such a method of dealing, it would be manifestly inequitable now to permit the company to relieve itself of liability by antedating a credit, and claim that it had never assumed any risk, when its own accounts show a charge of the premium, and the evidence fails to show any request for the actual payment of the premium, and an established practice to collect such premiums only at regular intervals.

The appellee devoted some attention to the alleged nonreturn of the unearned portion of the premium as affecting the validity of the attempted cancellation; but, in view of the conclusions already reached, it is unnecessary to dwell upon that phase of the case.

The decree of the circuit court for Baltimore City will accordingly be affirmed.

Decree affirmed, with costs.



FRAKES ET AL. VS. MUTUAL FIRE CO. OF PORTLAND.*

(Supreme Court of Oregon.)

1. APPEAL AND ERROR—REVIEW—PRESUMPTIONS.

In an action on an insurance policy, though the allegation of partnership of plaintiffs was denied in the answer, where the policy, loss, and adjustment thereof were admitted, and the court ruled, without objection or exception, that the defendants had the burden of proof, it will be presumed in the Supreme Court, in support of a finding that plaintiffs were partners, that defendant's counsel at the trial admitted that fact.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.)

2. INSURANCE — FORFEITURE — NONPAYMENT OF ASSESSMENT—NOTICE.

Where a policy in a mutual company recites that the member has bound himself to pay assessments, and also that he has paid a fixed sum, he has not in fact paid such sum, and the policy also sets out provisions of the constitution and by-laws of the company requiring the secretary to collect assessments and premiums, and providing that all losses shall be paid from the general fund maintained by assessments, that, if any assessment is not paid within thirty days after notice thereof is deposited in the postoffice at Portland, the policy shall be void, and that the company will issue a paid-up policy upon the payment of a sum into an advance assessment fund, if the fixed sum referred to in the policy is an advance assessment which should be paid within thirty

* Decision rendered, Jan. 20, 1914. 138 Pac. Rep. 224.

days after notice, mailing of the notice is a condition precedent to avoiding the policy for nonpayment.
 (For other cases, see Insurance, Cent. Dig. §§ 905-907, 1032, 1033; Dec. Dig. § 353.)

3. INSURANCE — FORFEITURE — NONPAYMENT OF ASSESSMENT—NOTICE.

Under a provision of a by-law of a mutual insurance company that, if an assessment is not paid within thirty days after notice thereof is mailed, the policy shall be void, a mere declaration of the amount due on the policy, without notice that the policy would become void if the amount were not paid within thirty days, was not sufficient.

(For other cases, see Insurance, Cent. Dig. §§ 908-911, 913; Dec. Dig. § 354.)

4. INSURANCE — FORFEITURE — NONPAYMENT OF ASSESSMENT—NOTICE.

Where the by-laws of a mutual insurance company require notice of assessments to be in writing, evidence of a parol notice is immaterial.
 (For other cases, see Insurance, Cent. Dig. § 912; Dec. Dig. § 355.)

5. INSURANCE — FORFEITURE — NONPAYMENT OF ASSESSMENT—NOTICE.

Where it might reasonably be inferred that a sum mentioned in a policy was a premium rather than an advance assessment, the policy did not give the notice required by the by-laws of the company to avoid a policy for failure to pay the assessment within a given time.

(For other cases, see Insurance, Cent. Dig. §§ 908-911, 913; Dec. Dig. § 354.)

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by P. A. Frakes and others, partners under the name of L. S. Frakes Company, against the Mutual Fire Company of Portland, Ore. From a judgment for plaintiffs, defendant appeals. Affirmed.

Robert J. O'Neil, of Portland, for Appellant.

R. J. Brock, of Portland (Sheppard & Brock, of Portland, on the brief), for Respondent Pacific Laundry Co.

L. E. Latourette, of Portland (Frank S. Grant, of Portland, on the brief), for Respondent City of Portland.



REYNOLDS ET AL. *vs.* GLOBE FIRE UNDERWRITERS OF ST. LOUIS, MO., ET AL.*

(Supreme Court of Louisiana.)

1. INSURANCE—ACTION ON POLICY—JURISDICTION.

A provision in an underwriters' policy of fire insurance, to the effect that "no suit * * * shall * * * be begun * * * for the recovery of any claim upon * * * this policy against more than one of the under-

* Decision rendered, Feb. 2, 1914. 64 South. Rep. 396. Syllabus by the Court.

writers at any time, * * * and that a final decision in such suit * * * shall be taken as decisive of the similar claim, so far as the same may subsist [against each of the other underwriters hereon] absolutely fixing his liability in the premises, [and] each of the underwriters herein, in consideration of this entire stipulation, so far as he is or may be individually concerned, expressly agrees to accept and abide by the result of such final decision, in the same manner and to the same effect as if he had been the sole defendant in a similar suit, * * * as to a similar claim against him, so far as the same may subsist," does not of itself, subject the several underwriters to the jurisdiction of courts other than those of their domiciles, nor does it obligate them to subject themselves to the jurisdiction of such courts.

(For other cases, see Insurance, Cent. Dig. § 1535; Dec. Dig. § 617.)

2. APPEARANCE—WAIVER OF PROCESS—WHAT CONSTITUTES.

When the evident and sole purpose of an exception is to deny the efficacy of a citation to bring the exceptor into a court having no jurisdiction of his person, it will not be construed, though inartificially drawn, as a waiver of citation.

(For other cases, see Appearance, Cent. Dig. §§ 91-102; Dec. Dig. § 20.)

Appeal from Third Judicial District Court, Parish of Bienville; Benj. P. Edwards, Judge.

Action by J. E. Reynolds and another, receivers, against the Globe Fire Underwriters of St. Louis, Mo., and others. From a judgment for certain defendants, plaintiffs appeal. Affirmed.

Reynolds & Williams and Wimberly & Reeves, all of Arcadia, for Appellants.

S. C. McGarrity, of Arcadia, for Appellees.

EBERHARDT *vs.* FEDERAL INS. CO. (No. 5,098.)*

(Court of Appeals of Georgia.)

1. INSURANCE — POLICY — APPRAISEMENT — IMPEACHMENT—WITNESSES.

Where a matter at issue between two parties is submitted to third persons for their determination, and these persons render an award which does not exceed the authority given to them in the submission and is in strict accordance therewith, they will not be heard to impeach the regularity or fairness of their findings.

(For other cases, see Insurance, Cent. Dig. §§ 1430-1432, 1434; Dec. Dig. § 574.)

2. INSURANCE—POLICY—DETERMINATION OF LOSS—ARBITRATION OF LOSS—ARBITRATION—BINDING EFFECT.

The policy of fire insurance on which the plaintiff sued bound the defendant to pay to him the amount of loss which he had sustained. The

* Decision rendered, Dec. 9, 1913. Rehearing denied, Feb. 4, 1914. 80 S. E. Rep. 856. Syllabus by the Court.

purpose of the submission to appraisers into which the parties entered was to fix the amount of the loss. The plaintiff's loss represented the difference between the value of the property before the fire and its value immediately thereafter. The effect of the award made by the appraisers was to fix the amount of the plaintiff's loss; it was unambiguous, was in strict accordance with the agreement of submission, and was binding upon the parties.

(For other cases, see *Insurance*, Cent. Dig. §§ 1430-1432, 1434; Dec. Dig. § 574.)

3. INSURANCE—DIRECTION OF VERDICT.

There being no proper evidence offered attacking the award for fraud or for any other reason for which it could be impeached under the law, it was not error to direct a verdict in favor of the plaintiff in accordance with the construction placed upon the award by the trial judge.

(For other cases, see *Insurance*, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

(Additional Syllabus by Editorial Staff.)

4. INSURANCE — POLICY — ARBITRATION — "SOUND VALUE AND DAMAGES"—"AMOUNT OF LOSS."

A submission, by agreement between insurer and insured, to appraisers to fix the amount of "sound value and damages" was in accordance with a provision of the policy authorizing submission of the "amount of loss" to appraisers; the phrases quoted being synonymous.

(For other cases, see *Insurance*, Cent. Dig. § 1425; Dec. Dig. § 569.)

5. EVIDENCE—PAROL—INSURANCE.

Where the terms of the submission of the amount of loss to arbitrators and the award of the arbitrators were unambiguous, parol evidence was not admissible to explain them.

(For other cases, see *Evidence*, Cent. Dig. §§ 2066-2084; Dec. Dig. § 448.)

6. INSURANCE—APPRAISEMENT—NOTICE.

Where the agreed terms of submission of the amount of loss to appraisers indicated that the appraisers were to proceed informally and did not provide for notice to the insured, failure to give the insured notice of the meeting of the appraisers or an opportunity to present evidence did not invalidate their award.

(For other cases, see *Insurance*, Cent. Dig. §§ 1422, 1423, 1427, 1429; Dec. Dig. § 572.)

7. INSURANCE—POLICY—AWARD OF APPRAISERS—VALIDITY.

An award by appraisers selected pursuant to a fire insurance policy to determine the amount of loss may be set aside, under Civ. Code 1910, §§ 5028, 5029, for fraud or by showing that unfair advantage has been given to one of the parties or for a palpable mistake of law.

(For other cases, see *Insurance*, Cent. Dig. §§ 1430-1432, 1434; Dec. Dig. § 574.)

Error from City Court of Savannah; Davis Freeman, Judge.
Action by Gus Eberhardt against the Federal Insurance Company.

Judgment for plaintiff for less than claimed, and plaintiff brings error.
Affirmed.

Rehearing denied; Russell, C. J., dissenting.

Anderson, Cann & Cann, of Savannah, for Plaintiff in Error.
Adams & Adams, of Savannah, for Defendant in Error.



MONONGAHELA INS. CO. ET AL. VS. BATSON.*

(Supreme Court of Arkansas.)

1. INSURANCE—CONTRACTS—CONSTRUCTION.

Where the terms of an insurance contract are unambiguous they must be construed according to their plain meaning, but where there is an ambiguity, all doubts must be resolved in favor of the insured and against the insurer.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

2. INSURANCE—CONTRACTS—CONSTRUCTION—"CHATTEL MORTGAGE."

The owner of a sawmill and lumber covered by insurance policies, providing that they should be void if the personality was incumbered by chattel mortgages, executed a written agreement, reciting that he was indebted to a third person and an agreement that all lumber sawed at the mill should be the property of the creditor and shipped in his name. It also provided that as one C. desires to buy the lumber on hand, the parties agreed that C. should purchase it with the understanding that the title should remain in the creditor until the debt was paid. Held, that the agreement was not a chattel mortgage, which is defined as a bill of sale with a defeasance clause incorporated in it, and hence it did not fall within the condition of the policies.

(For other cases, see Insurance, Cent. Dig. §§ 829-839; Dec. Dig. § 330.)

(For other definitions, see Words and Phrases, vol. 2, pp. 1098-1106.)

Appeal from Circuit Court, Polk County; Jeff T. Cowling, Judge. Actions by A. J. Batson against the Monongahela Insurance Company and others, which were consolidated on trial. From a judgment for plaintiff, defendants appeal. Affirmed.

Wright Prickett and Elmer J. Lundy, both of Mena, for Appellants. Wm. Thompson, of Dallas, Tex., and J. I. Alley, of Mena, for Appellee.

* Decision rendered, Jan. 26, 1914. 163 S. W. Rep. 510.

BEYER *vs.* MINNESOTA FARMERS' MUT. INS. CO.*

(Supreme Court of Minnesota.)

INSURANCE—CYCLONE POLICY—CONSTRUCTION—REBUILDING.

A cyclone policy contained a provision that, in case of disagreement as to loss, the question should be arbitrated. It also authorized the insurer to replace the property damaged in lieu of cash payment. Plaintiff's barn was damaged by a cyclone, and, upon the inability of the parties to agree as to the loss, the insurer undertook to rebuild it. *Held* that, regardless of whether plaintiff had refused to submit the question of damage to arbitration, the insurer's right to arbitration was waived, and no arbitration was necessary as a condition precedent to a suit to recover damages for failure to replace the barn in as good condition as before the injury.

(For other cases, see *Insurance, Cent. Dig.* §§ 1520-1529; *Dec. Dig.* § 612.)

Appeal from District Court, Swift County; G. E. Qvale, Judge. Action by John A. Beyer against the Minnesota Farmers' Mutual Insurance Company. From a judgment for plaintiff, defendant appealed. Affirmed.

Jas. A. Peterson, of Minneapolis, for Appellant.
T. J. McElligott, of Appleton, for Respondent.

* Decision rendered, Feb. 20, 1914. 145 N. W. Rep. 276.

ACCIDENT AND HEALTH.

SUPREME COURT OF NEW YORK.
APPELLATE DIVISION. FIRST DEPARTMENT.

RIDGELEY

vs.

ÆTNA LIFE INS. CO.*

1. INSURANCE—ACCIDENT INSURANCE—OCCUPATION OF INSURED—“RECREATION.”

Where one insured as a financial writer and reporter was engaged, when injured in testing and trying out in the air a flying machine he had built, he was not engaged in “recreation,” within the provision of the policy that if insured after having changed his occupation to one rated more hazardous, or while engaged in doing an act pertaining to the occupation so rated except while engaged in recreation, the company’s liability shall be only such proportion as the premium paid will purchase at the rate for the more hazardous occupation.

(For other cases, see Insurance, Cent. Dig. § 1165; Dec. Dig. § 453.)

(For other definitions, see Words and Phrases, vol. 7, p. 6021.)

2. INSURANCE — ACCIDENT INSURANCE — EXTRAORDINARY OCCUPATION.

Where the classification of risks provided that each \$1,000 of insurance carried with it \$5 weekly indemnity, unless otherwise specified, and recited, after the classification, “Occupation, æreonaut (not insurable),” that the limit of risk was \$500, insured could only recover \$2.50 a week for injuries sustained while operating a flying machine.

(For other cases, see Insurance, Cent. Dig. §§ 1309, 1316, 1317; Dec. Dig. § 530.)

Hotchkiss, J., dissenting.

Appeal from Trial Term, New York County.

Action by Albert Newton Ridgely against the Ætna Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed, and judgment directed for plaintiff on decision as modified.

Argued before Ingraham, P. J., and McLaughlin, Laughlin, Dowling, and Hotchkiss, JJ.

John Vernou Bouvier, Jr., of New York City (W. Montague Geer, Jr., of New York City, on the brief), for Appellant.
 David B. Lackey, for Respondent.

LAUGHLIN, J.

This is an action to enforce the liability of the defendant on a policy of accident insurance which it issued to plaintiff on the 12th

* Decision rendered, February 13, 1914. 145 N. Y. Supp. 1075.

day of June, 1911. The issues were, by consent, tried before the court without a jury.

At the Mineola aviation field on the 21st day of July following the issuance of the policy, the plaintiff made an ascension alone in a Curtiss type biplane, which he had constructed with a view to renting on shares to aviators desiring to enter aviation prize contests. He ascended 20 or 30 feet, and then, on attempting to keep the machine on that level he found that it was not properly balanced. It continued to ascend, and he was carried to a height of 60 or 70 feet. By leaning far forward he changed the course to downward, and then, before he could right it, the forward wheels struck the ground, and it toppled over, and he sustained injuries from which it was stipulated that he suffered a total disability for six weeks and three days, and a partial disability for eighteen weeks thereafter. By the terms of the policy, for the risk contemplated, plaintiff would be entitled to an indemnity of \$30,000 in case of death and at the rate of \$150 per week for total disability, and one-half that amount for partial disability. He has recovered for disability on that basis.

The principal contention made in behalf of the appellant is that plaintiff was guilty of a breach of warranty in his application on which the policy was issued, and therefore could not recover. The plaintiff has long taken an active interest in athletics and personally participated in feats of diving, skating, and bicycle riding. He described his occupation during the last fifteen years before the trial as that of a financial writer and reporter. About one year prior to taking out the policy he became interested in aeroplanes and had been experimenting with models during all or the last half of that period. He conceived the idea of building one, and in January, 1911, he, with the assistance of others whom he employed, commenced constructing it. It was practically completed and ready for testing in May of that year. He was testing and experimenting with it at the time he met with the accident. He had experimented with the machine on the ground a few times before, but had not attempted to rise from the ground with it; but on one occasion a few days before the accident, he ran it only a short distance just skimming the ground. According to his testimony, he did not expect personally to test the machine when he went to the aviation field on the day of the accident, for he had an appointment with one Russell, who was to try it, and Russell having failed to appear, and everything being favorable, he determined to test it near the ground himself. He had visited the field and observed flights of aviators that spring three or four times a week.

At or shortly before the time plaintiff applied for the policy for \$15,000, and prior thereto he had no policy of accident insurance "that amounted to anything," as he put it. The application was on a printed blank furnished by the company for twenty statements of fact which the applicant warranted to be true. The seventh

statement with the blank filled in became a representation that he understood that risks are classified according to occupations, and that his occupation, "financial writer and reporter," as therein described, was "preferred." The fifteenth statement as printed was as follows:—

"I have not in contemplation any special journey nor any hazardous undertaking, not required by my occupation as above described, except as herein stated."

And in the blank following there was filled in, "No exceptions."

It is urged on the part of the appellant that the statement that he did not contemplate any hazardous undertaking was false.

It must be conceded that the evidence, the substance of which has been stated, gives rise to a strong suspicion that plaintiff applied for the insurance in anticipation of an accident from his bi-plane, which was then ready for ascension; but that depends on the state of his mind at the time. In the view we take of another point and of a suggestion made by counsel for appellant that a new trial is not desired, we do not deem it necessary to decide whether the finding is so clearly against the weight of the evidence as to justify a reversal and a finding to the contrary or a new trial on that ground. We are of opinion that in no event can plaintiff recover more than \$38.57, which would not entitle him to costs, and therefore we think that justice will be fairly approximated, if not fully attained, by reducing the recovery by that amount.

There is some conflict between the provisions of the policy itself and the company's "Classification Manual for Accident Insurance" filed, prior to plaintiff's application, with the Superintendent of Insurance of this state pursuant to the provisions of section 107 of the Insurance Law (Consol. Laws, c. 28), which were added thereto by chapter 636 of the Laws of 1910. The policy proper indicates that different risks are classified differently by the defendant, but it does not show or indicate that there are any risks against which the company does not insure at all, and it does not set forth the classification of risks; but said Classification Manual shows several risks there stated to be noninsurable. That is shown in such a manner, however, as to indicate that the company recognizes that it is liable to the extent of \$500 in cases of accidents against which it prescribes no rates and for which it issues no policy expressly. Paragraph D of "Part XII" of the "General Provisions" of the policy is as follows:—

"If the insured is injured after having changed his occupation to one rated by this company in a more hazardous class than the premium paid by this policy covers, or while temporarily or otherwise engaged in doing an act or thing pertaining to any occupation so rated (except ordinary duties about his residence or while engaged in recreation), the company's liability shall be only such proportion of the principal sum or other indemnity as the premium paid by him will purchase at the rate and within the limit fixed by

this company for such more hazardous occupation. Any unearned premium in excess of the amount required for such limit will be refunded upon demand."

In his application plaintiff stated his duties as "financial writer and reporter" to be "writing a daily market letter, forecasting financial probabilities."

[1] Plaintiff attempts to sustain the recovery on the theory that he was engaged in "recreation," within the exception contained in the paragraph quoted. There is no merit in that point, for plaintiff admitted that his purpose in ascending was to test and try out the machine. Defendant's said classification is not printed in the record, but extracts therefrom are set forth, as follows: Under the heading "Instructions" it contains the following:—

"This Classification Manual covers only the classification, limit of risk, premiums, and designations of occupation to be used in writing accident business. * * * The maximum limit of risk is given at \$10,000, but especially desirable, 'select' and 'preferred' risks may be written for \$15,000 or for larger amounts upon special approval by the company. Applications, with full information, must be submitted to the company to secure such approval."

Under the heading "Classification of Risks," it contains the following:—

"Each \$1,000 of insurance carries with it \$5.00 weekly indemnity, unless otherwise specified."

It also contains on page 6 the following:—

Occupation.	Class.	Limit of Risk.
Aeronaut, navigator, or passenger (not insurable).	H. X. Ex. Peril.	\$500

And on page 7 under the same headings:—

Air ship operator, builder, owner, experimenter, inventor, or pas- senger making ascensions (not insurable).	H. X. Ex. Peril.	\$500
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And on page 10 under the same headings:—

Aviator (not insurable).	H. X. Ex. Peril.	\$500
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[2] Assuming that plaintiff had knowledge of the fact that the Classification Manual was filed, and of its contents as found, still he would have been warranted in deeming that the company would be liable in any event for \$500 if he met with an injury while temporarily ascending in, or experimenting with, his biplane. According to the strict terms of the policy, the plaintiff having been injured while engaged temporarily in performing acts relating to a more hazardous occupation, the company would be liable

for the proportion of the insurance stated in the policy which the premium he paid would purchase at the rate fixed by the company for the more hazardous occupation ; but, since by consulting the Classification Manual of which he had constructive notice, at least (see section 107 of Insurance Law), it appears that it does not insure such risks at all, the plaintiff is necessarily limited by the \$500 liability provision. Since each \$1,000 of insurance carries with it a weekly indemnity of \$5 unless otherwise specified, it is reasonable to conclude that each \$500 of insurance carries one-half that amount. For the period of total disability, therefore, plaintiff was entitled to \$2.50 per week, and, since he was to receive only one-half as much for partial as for total disability, the company's liability to him for partial disability is \$1.25 per week, aggregating \$38.57.

These views require the reversal of finding numbered 22, and that a finding be inserted in its place to the effect that plaintiff was not engaged in recreation at the time he was injured ; and additional findings should be made setting forth the terms of the policy and Classification Manual on which these views are taken, in so far as not contained in the decision ; and conclusions of law numbered 4, 6, and 7 should be reversed, and a conclusion of law inserted in place thereof to the effect that plaintiff is entitled to recover \$38.57 and interest from February 19, 1912 ; and that the judgment should be reversed with costs to appellant, and judgment directed for plaintiff on the decision as modified.

Ingraham, P. J., and McLaughlin and Dowling, JJ., concur.
Hotchkiss, J. I dissent and vote for affirmance.



COURT OF APPEALS OF KENTUCKY.

PACIFIC MUT. LIFE INS. CO.

vs.

McCABE.*

1. INSURANCE—LIFE INSURANCE—ACTION—SUFFICIENCY OF EVIDENCE.

Evidence, in an action on a life and accident policy, held to sustain a finding that a fall by insured caused injury to the colon, which resulted in certain conditions in the bowels, found to exist at the autopsy.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

* Decision rendered, Feb. 5, 1914. 162 S. W. Rep. 1136.

2. INSURANCE — LIFE INSURANCE — CONSTRUCTION OF POLICY.

A life and accident policy provided that if any of the total loss resulted from accident independently of all other causes within ninety days from the accident, the company would pay a certain sum for loss of life, and in addition the disability benefits provided for in clause 1 for the time between the accident and such total loss, and illness benefits at so much per month for the time not exceeding six months that insured is necessarily and continuously confined within the house. *Held*, that the fact that insured collected a disability benefit would not prevent a recovery by his beneficiary for the loss of his life.

(For other cases, see Insurance, Cent. Dig. § 1315; Dec. Dig. § 529.)

3. INSURANCE — CONSTRUCTION OF POLICY.

In case of doubt, an insurance policy will be construed in favor of the insured, and a positive undertaking by the company in one part of the policy will not be permitted to be negatived by a doubtful clause in another part.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

4. INSURANCE — LIFE INSURANCE — CONSTRUCTION OF POLICY.

Under the provisions of a life and accident policy, providing that in the event of any claim arising under the policy, irrespective of its cause, due directly or indirectly to peritonitis, etc., benefits shall be paid solely under illness benefits as provided under another clause, except that in case of a claim arising due to infection as a direct result of accident, such infection having its inception while insured is under the care of a physician, benefits shall be paid under accident benefits as provided in other clauses, only sick benefits will be paid for diseases such as peritonitis, unless there is an infection directly resulting from the accident.

(For other cases, see Insurance, Cent. Dig. §§ 1309, 1316, 1317; Dec. Dig. § 530.)

5. INSURANCE — LIFE INSURANCE — ACTIONS — ADMISSION OF CORONER'S VERDICT.

The verdict of the coroner's jury was properly excluded from evidence in an action on a life policy.

(For other cases, see Insurance, Cent. Dig. §§ 1691-1693; Dec. Dig. § 659.)

Appeal from Circuit Court, Fayette County.

Action by Thomas McCabe against the Pacific Mutual Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. C. G. Hobbs, of Lexington, for Appellant.
Allen & Duncan, of Lexington, for Appellee.

HOBSON, C. J.

The Pacific Mutual Life Insurance Company issued to William McCabe on July 21, 1911, a policy of insurance; his brother, Thomas McCabe, being named as beneficiary, by which it insured him "against the results, hereinafter set forth, of and caused solely by external, violent, and accidental means at once producing visible

and external mark upon the body, such means so producing such mark being hereinafter called accident, such accident happening during the term of and while this policy is in full force and effect, against the effects, hereinafter set forth, of illness, and promises to pay benefits as hereinafter set forth. * * * (1) Disability benefits at the rate of forty (\$40.00) dollars per month, not exceeding twenty-four months, that such accident, independently of all other causes, immediately, totally and continuously disables the insured from the time of such accident from the performance of any and every kind of duty pertaining to the insured's occupation. * * * (3) If any of the total losses specified in the following table of total loss benefits shall result from such accident, independently of all other causes, within ninety days from the happening of such accident, the company will pay: For loss of (1) life, four hundred (\$400.00) dollars (the principal sum of this policy). [Here follows table.] If any of the losses specified in the above table of total loss benefits shall result from such accident, independently of all other causes, after ninety days and within twenty-four months from the happening of such accident, provided the insured is continuously and totally disabled from engaging in any and every work and occupation for wages or profit from the happening of such accident to the date of such total loss, then the company will pay the amount specified in the above table of total loss benefits, and in addition, disability benefits provided for in clause 1 hereof for the time between date of accident and date of such total loss. * * * (5) Illness benefits at the rate of forty (\$40.00) dollars per month for the time, not exceeding six months, that said insured is necessarily and continuously confined inside the house and regularly visited in the house by a legally qualified physician by reason of disease that is contracted and begins after this policy has been maintained in force continuously for two months."

The policy also contained these provisions: (10) "In the event of any claim arising under this policy (irrespective of its cause) due directly or indirectly, wholly or in part, to any chronic disease or infirmity, tuberculosis, rheumatism, paralysis, apoplexy, orchitis, neuritis, locomotor ataxia, lumbago, strains, lame back, sciatica, vaccination, Bright's disease, dementia, insanity, vertigo, fits, hernia, or in the event of any accident otherwise covered by this policy resulting in hernia or either accident or illness of which there shall be no visible marks on the body (drowning excepted), then and in all such cases benefits shall be paid solely under illness benefits as provided under clause 5 of this policy, but in no event for an amount in excess of the amount payable for one month's house confinement under said clause, anything to the contrary herein notwithstanding. But no indemnity shall be payable under this policy for any loss due directly or indirectly, wholly or in part, to any venereal disease, or to any

disease not common to both sexes." (11) "In the event of any claim arising under this policy (irrespective of its cause) due directly or indirectly, wholly or in part, to sunstroke, peritonitis, appendicitis, abscesses, ulcers, blood poisoning, infection, or contact with poisonous or infectious substances then and in all such cases benefits shall be paid solely under illness benefits as provided under clause 5 of this policy; except that in the event of claim arising due to infection or blood poisoning following immediately after and as a direct result of accident, such infection or poisoning having its inception while insured is under the care of a physician, then in such case benefits shall be paid under accident benefits as provided in clauses 1, 2 and 3 of this policy." (d) "The right to make claim for one of the above specified results of any accident or illness or disease shall exclude all other claims based upon the same accident or illness or disease, and the right to make any claim except a claim under clauses 1, 2, and 5 shall cause this policy to cease and it shall be surrendered to the company.

William McCabe was a painter by trade, and on December 12, 1911, while the policy was in force, he suffered a fall by which he sustained a severe bruise on his left hip. He was confined to his house by the injury and was treated by a physician, who administered to the external wound. The wound got better, and on January 6th McCabe applied for a disability benefit under clause 1 of his policy. The amount, \$33, was paid to him, and he received to the company for it, he then supposing that he would be able to go to work within a month from the time he was injured; but instead of getting better after January 12th he began suffering pains in his stomach and side and was not able to do any work. On the evening of January 29th he ate two soft boiled eggs for supper, said he did not feel well, and would go to bed. He went to bed, and the next morning at 9 o'clock was found in bed dead; nobody having seen him from the time he went to his room until that time. This suit was brought by the beneficiary against the insurance company to recover \$400, the amount for which his life was insured. On a trial of the case in the circuit court, the plaintiff recovered. The defendant appeals.

The proof on the trial showed in addition to the facts we have stated that after his death an autopsy was performed upon his body which disclosed the fact that there was a hole as large as a silver quarter in the transverse colon; that nature attempted to close the aperture and the escaping matter passed into the omentum; that the matter escaping from the colon and gathered in the omentum was the cause that the bowels, instead of being in a natural condition, were found stuck together. The surgeons who testified on the trial testified that death ensued when the omentum no longer contained this matter, and it escaped into the peritoneum. They also testified that, from the condition in which they found

the bowels, the injury to the colon was the cause of the trouble ; that this might have come from such a fall as we have described ; and that the condition of the bowels indicated that the trouble with the colon had existed some weeks.

[1] Their testimony warranted the jury under the facts in concluding that the fall caused the injury to the colon, and the injury to the colon caused the effects they found in the body of the deceased, for the insured was never well after the accident.

[2] 1. It is insisted for the appellant that, William McCabe having collected a disability benefit, no recovery can be had for the loss of his life. But it will be observed that, by clause 3 of the policy, the company was obligated to pay the amount specified in the table of total loss benefits for ninety days, and in addition disability benefits provided for in clause 1. The insured was by this clause of his policy entitled to not only the disability benefit for one month, but the \$400 for the loss of his life was also payable when he died on January 29th. Clause "d" was not intended to conflict with this clause. The words used therein are "the right to make claim." In other words, the right to make claim for certain things under the policy excluded all other claims based upon the same accident, illness, or disease. There is nothing in this clause properly construed to show that the payment of a disability benefit in any way affected the right to collect the principal sum of the policy in case the insured died, the purpose of clause "d" being simply to show that the policy did not contemplate a number of claims under the different provisions of the policy, such as disability benefits and sick benefits, also for same illness or accident ; but such a limitation must not be read as conflicting with an express provision in the previous part of the policy, giving a right to collect the disability benefit and also the death loss.

[3] The insurer selects his own language, and, in case of doubt, the policy will be construed in favor of the insured, and the positive undertaking in one part of the policy will not be construed as negatived by a doubtful clause in another part.

2. The insured did not die of hernia ; the term has a well-defined meaning ; and so clause 10 has no application. He died of peritonitis, according to the testimony, and clause 11 applies, but by that clause, in the event of claim arising due to infection and following immediately after, and as a direct result of accident, and having its inception while the insured is under the care of a physician, then in such case accident benefits shall be paid as provided in clauses 1 and 3 of the policy. The proof for the plaintiff showed that he died of infection following immediately after and as the direct result of an accident ; that the infection had its inception while he was under the care of a physician, although the physician did not discover it, as it was an internal trouble and not then manifesting itself by anything externally.

[4] The fair meaning of clause 11 is that, for the diseases there-

in mentioned, only sick benefits will be paid as provided in clause 5, unless there is an infection, the direct result of accident, and this infection produces the disease.

3. The instructions of the court fairly submitted to the jury the law of the case as we have outlined it, and the evidence warranted the jury in the verdict they found. There was no error in the admission or rejection of evidence.

[5] The court properly refused to admit in evidence the verdict of the coroner's jury. *Aetna Life Ins. Co. vs. Milward*, 118 Ky. 716, 82 S. W. 364, 68 L. R. A. 285, 4 Ann. Cas. 1092.

Judgment affirmed.

SUPREME COURT OF APPEALS OF WEST VIRGINIA.

COMBS

vs.

COLONIAL CASUALTY CO.*

1. INSURANCE—ACCIDENT POLICY—"OBVIOUS RISK."

A person who attempts to cross a railroad track immediately in front of a rapidly approaching train, and is run over and killed, exposes himself to an "obvious risk of injury or obvious danger," within the meaning of a condition in an accident insurance policy, limiting the liability of the insurer.

(For other cases, see Insurance, Cent. Dig. §§ 1180, 1181; Dec. Dig. § 461.)

(For other definitions, see Words and Phrases, vol. 6, p. 4896.)

2. INSURANCE — ACCIDENT POLICY—"OBVIOUS DANGER."

An obvious danger is one that is plain and apparent to a reasonably observant person, and the fact that insured may not have observed it and been conscious of it at the time of the fatal accident is not material. He owed to the insurer, as well as to himself, the duty to be reasonably careful when in the presence of an obvious danger, and his failure to use reasonable care does not excuse him.

(For other cases, see Insurance, Cent. Dig. §§ 1180, 1181; Dec. Dig. § 461.)

(Additional Syllabus by Editorial Staff.)

3. WORDS AND PHRASES—"OBVIOUS"—"PLAIN"—"CLEAR"—"EVIDENT."

The word "obvious" means easily discovered, seen, or understood, readily perceived by the eye or the intellect, plain, evident, apparent, and is synonymous with the words "plain," "clear," and "evident."

(For other definitions, see Words and Phrases, vol. 6, pp. 4895, 4896, 5396; vol. 2, p. 1219; vol. 3, pp. 2525, 2526.)

* Decision rendered, Jan. 14, 1914. 80 S. E. Rep. 779. Syllabus by the Court.

Error to Circuit Court, Raleigh County.

Action by M. J. Combs against the Colonial Casualty Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Enslow, Fitzpatrick & Baker, of Huntington, for Plaintiff in Error.
W. H. Rardin, of Beckley, A. A. Lilly, of Charleston, and J. W. Maxwell, of Beckley, for Defendant in Error.

WILLIAMS, J.

George W. Comb was run over and instantly killed by an engine and train of cars while attempting to cross the tracks of the Chesapeake & Ohio Railway Company at a crossing at Hoo Hoo, in Raleigh County, on the 18th day of August, 1910. This action was brought by his wife against the Colonial Casualty Company, on an accident policy issued by it to deceased, to recover \$2,500, the amount of insurance agreed to be paid to her in case of the accidental death of insured. Defendant admitted its liability to pay \$500 and tendered that sum at the trial, which plaintiff declined to accept, and waived payment of it into court. Defendant then filed three special pleas averring that certain conditions in the policy had been violated, which it claims exonerated it from the payment of any more than the sum tendered. Upon the issues joined on the pleas, judgment was rendered, on a demurrer to the evidence, in favor of plaintiff for the full amount sued for; and defendant has brought the case here on writ of error.

One of the pleas avers that deceased met his death by exposure to an obvious risk or danger in carelessly and negligently attempting to cross the railroad track in front of an approaching engine, and that in view thereof, according to an express stipulation of the contract of assurance, defendant was liable to pay only one-fifth of the amount which would otherwise be payable under the policy. It is expressly provided in the policy that in the event of accident, fatal or otherwise, occurring under certain conditions, the insurer's liability shall be limited to one-fifth of the amount which would be otherwise payable, one of which conditions is "exposure to obvious risk of injury or obvious danger" by the insured.

[1] The case turns solely upon the question whether the insured violated this condition of the policy. Did he expose himself to an obvious risk of injury or obvious danger? H. P. Youell, the engineer in charge of the locomotive, was the only eyewitness to the accident. He testified that on the morning of the 18th of August, 1910, his engine ran over and killed a man, whom he afterwards learned to be George W. Combs, at a public crossing near a little station called Hoo Hoo; that when he was about 250 yards east of the crossing, he blew the whistle for the crossing, and then saw deceased walking on the track in front of the engine, going in the direction of the crossing and about 45 or 50 yards from it; that when the whistle sounded deceased stepped down off the track into a path that ran along parallel to the track, and continued his course toward the crossing; that, when his

engine approached within about 100 yards of the crossing, he blew the whistle the second time, and saw deceased glance back over his shoulder toward the engine and then turn and continue his course along the path toward the crossing; that at that time, he thinks, deceased was about 15 steps from the crossing; that when deceased reached the crossing he "just whirled and stepped right up on the track, like he was aiming to go across at the crossing." Witness was riding on the left side of his engine, and deceased was walking along the path on the same side of the track, and, when deceased attempted to cross the track, he was struck by the tender and knocked down and his body run over by the right wheels of the engine. Witness says that, after the body of deceased had passed out of his view in front of the tender, he saw his leg and foot slip up just before the engine hit him, but could not tell whether he was then in the act of jumping or falling. The crossing was ballasted with loose slag. The accident occurred in broad daylight, and there was nothing to obstruct deceased's view of the approaching train. Witness also says that deceased was walking along with his head bowed, and did not look up, or stop, before attempting to cross the track; and that the train was then running at the speed of about 12 or 15 miles an hour. The railroad grade, at this point, he says, was practically level, and there was nothing to obstruct the view of the engine, if deceased had looked toward it. The foregoing testimony is undisputed, and, from the facts thereby proven, the jury were bound to infer that deceased, who was not shown to be wanting in any of the natural senses and faculties, either knew, or was grossly negligent not to know, that the engine was dangerously near. Had he looked, or even glanced, toward the approaching engine, before attempting to cross the track, he would have instantly seen that it was too near, and was approaching at too great a speed, to permit him to cross the track in front of it in safety. It is not necessary, in order to establish a breach of the condition in the policy, to prove that deceased actually saw, or was conscious of, the nearness of the approaching engine.

[2, 3] The danger was obvious, whether he was conscious of it or not. It was his imperative duty to stop and look before attempting to cross the track. The word "obvious," as used in the contract of assurance, bears its common, or generally accepted, meaning, one of which, as defined by Webster, is "easily discovered, seen, or understood; readily perceived by the eye or the intellect; plain; evident; apparent." It is synonymous with the words "plain," "clear," and "evident." The risk was so manifestly dangerous that we are compelled to say, as matter of law, no ordinarily prudent person would have voluntarily assumed it.

In Diddle vs. Casualty Co., 65 W. Va. 170, 63 S. E. 962, 22 L. R. A. (N. S.) 779, which was an action to recover for the accidental death of the insured, on an accident insurance policy con-

taining a condition almost identical with the one on which defendant here relies, it was held that: "Either reckless or deliberate encountering of known danger or danger so obvious that a reasonably prudent man would have observed and avoided it, if the circumstances were not such as necessitated the encountering thereof, is a voluntary exposure within the meaning of a clause, in an accident insurance policy, limiting the liability of the insurer in case of an injury resulting from 'voluntary exposure to unnecessary danger or obvious risk of injury.'" The danger which deceased encountered in the present case was even more obvious and the risk more hazardous than the one Diddle exposed himself to in that case.

In Bassford, Adm'r, etc., vs. Railway Co., 70 W. Va. 280, 73 S. E. 926, this court decided that: "It is negligence for a pedestrian at a crossing to step in front of an approaching train when the train is in full view and so near that no prudent man would undertake to cross."

If this action had been against the railroad company by deceased's representative for negligently causing his death, there can be no doubt that in view of the undisputed facts as disclosed by the record, deceased's contributory negligence would preclude recovery. No prudent man would have undertaken to cross the track so close in front of a rapidly approaching engine. It may be that at the time of the accident, deceased's mind was so occupied with thoughts of other matters that he was oblivious to the approaching train and was therefore not conscious of the immediate danger of attempting to cross the track. If that be so, it was his own misfortune, and the law does not excuse his negligence. It was his duty to exercise care in the presence of so great and imminent a danger, and his failure to do so was negligence. The danger to which deceased exposed himself was obvious, within the meaning of the condition of the policy pleaded, whether he was conscious of it at the time or not, and exonerates defendant from payment of any more than one-fifth of the amount for which it would otherwise have been liable. The demurrer to the evidence should have been sustained.

At the trial defendant tendered \$500, the amount for which it admitted liability, and plaintiff waived the payment of it into court. Whether this sum is actually in the custody of the court is not certain, but the jury evidently treated it as having been paid, for it returned an alternative verdict assessing plaintiff's damages at \$2,000, in the event the court held the law to be with plaintiff, on the demurrer to the evidence, and found for the defendant, in the event the court found the law to be in its favor. The court rendered judgment for \$2,000, and also ordered the \$500 tendered to be "paid to the plaintiff or held by the general receiver of this court until the further order of the same." If the \$500 is in the custody of the court, the judgment should have been for

defendant, because its liability was fully discharged by payment of the \$500. We therefore reverse the judgment and sustain the demurrer to evidence; and, it not appearing from the record whether the \$500 for which defendant admitted its liability was actually paid into court, this court is not advised as to the judgment that should be rendered. The cause will therefore be remanded for the entry of such judgment by the circuit court as may be proper, consistent with the law of the case herein determined. If defendant has kept its tender good, or has actually paid the \$500 into court, plaintiff is not entitled to interest thereon after that date; neither can she recover costs in the lower court, accruing after the time tender was made in court. Defendant is, of course, entitled to its costs in this court.

Reversed and remanded.

UNITED STATES HEALTH & ACCIDENT INS. CO. *vs.*
SAVAGE.*

(Supreme Court of Alabama.)

1. INSURANCE—ACTION ON POLICY—COMPLAINT—REQUISITES.

The complaint, in an action on an insurance policy in the form prescribed by Code 1907, p. 1196, must contain a description of the policy sued on to the extent of its date and the term of its operation.

(For other cases, see Insurance, Cent. Dig. §§ 1575-1580, 1584-1586, 1592, 1598; Dec. Dig. § 629.)

2. PLEADING—ACTION ON POLICY—VARIANCE.

The complaint, in an action on a policy, alleged that plaintiff claimed of defendant \$300 on a policy whereby defendant on March 15, 1909, insured for three years the life and health of plaintiff, who suffered a disability by illness from July 16, 1909, to January 1, 1910, of which defendant had notice, etc. The contract proved, however, was made as alleged on March 15, 1909, but provided that the insurance would expire one month after the policy's date, but might be consecutively renewed from term to term, subject to all conditions, on payment of monthly premiums in advance, and that the acceptance of any renewal premium should be optional with the company, which might cancel the policy at any time by mailing a written notice to the assured. *Held*, that the policy proved was not the policy alleged, and that the variance was fatal.

(For other cases, see Pleading, Cent. Dig. § 1338; Dec. Dig. § 398.)

3. PLEADING—VARIANCE—VIDELICET.

A videlicet will not avoid a variance in the pleading nor dispense with exact proof, in an allegation of a material matter.

(For other cases, see Pleading, Cent. Dig. §§ 1217-1223; Dec. Dig. § 374.)

* Decision rendered, Jan. 22, 1914. 64 South. Rep. 340.

4. PLEADING—VARIANCE—AVAILABILITY.

Prior to Circuit Court Practice rule 34 (175 Ala. p. xxi), providing that a variance is available to the opposite party only when proper and seasonable objection is made, such objection was sufficiently presented by an unexplained request for the affirmative charge.

(For other cases, see Pleading, Cent. Dig. §§ 1438-1441; Dec. Dig. § 430.)

Appeal from Circuit Court, Jefferson County; John C. Pugh, Judge. Action by J. J. Savage against the United States Health & Accident Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The complaint is as follows: "Plaintiff claims of defendant \$300 due on a policy whereby defendant, on, to wit the 15th day of March, 1909, insured for the term of, to wit, three years, the life and health of plaintiff, J. J. Savage, who suffered disability by reason of illness from, to wit July 16, 1909, to January 1, 1910, of which defendant has had notice. Said policy is the property of plaintiff."

The contract of insurance proved by plaintiff, by secondary evidence, the writing having been lost, was made as alleged on or about March 15, 1909, but contained the following provision: "This insurance will expire one month from the time this policy is dated at 12 o'clock noon, standard time, at the place where counteracted, but may be consecutively renewed from term to term, subject to all of its conditions upon the payment of the monthly premium in advance." It contains a provision also that the acceptance of any renewal premium shall be optional with the company, and that the company may cancel this policy at any time by mailing written notice to the assured, etc.

The complaint was amended by the addition of several of the common counts, but no evidence is offered in support of those counts. The court refused the affirmative charge in writing requested by defendant, and there was judgment for plaintiff for \$348.

Abbott & Daugette, of Birmingham, for Appellant.
Gaston & Pettus, of Birmingham, for Appellee.

SMITH vs. ARKANSAS NAT. INS. CO.*

(Supreme Court of Arkansas.)

INSURANCE—DEFENSES—WAIVER.

Where an accident policy required, as a condition to liability, written notice of the injury within ten days from the accident, that defendant's claim adjuster, on receiving proof of death, notwithstanding notice had not been given within the ten days' period, denied liability on the ground that the accident was not covered by the policy and made no reference as to failure to give the required notice did not constitute a waiver of the insurer's right to rely on such default as a defense to its liability.

(For other cases, see Insurance, Cent. Dig. §§ 1393-1404; Dec. Dig. § 560.)

* Decision rendered, Jan. 12, 1914. 162 S. W. Rep. 772.

Appeal from Circuit Court, Randolph County; John W. Meeks, Judge. Action by Pearl E. Smith against the American National Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

C. H. Henderson, of Pocahontas, for Appellant.
Horace Chamberlin and Wallace Townsend, both of Little Rock, for Appellee.

DOUVILLE *vs.* PACIFIC COAST CASUALTY CO.*

(Supreme Court of Idaho.)

1. INSURANCE—NOTICE OF ACCIDENT—WAIVER.

In an action on an accident policy, *held*, that the whole course of dealing by the defendant company shows that it recognizes a local agent as an agent in receiving oral notice and proof of the accident, and so acted upon such information as to waive a strict compliance with the giving of written notice of such accident.

(For other cases, see Insurance, Cent. Dig. §§ 1071-1077; Dec. Dig. § 396.)

2. TRIAL — ACTION ON ACCIDENT POLICY — COMPLAINT — WAIVER OF NOTICE.

Even though the complaint does not allege a waiver of proof of notice, where facts constituting the waiver are introduced by the defendant itself, without objection, the defendant will not be permitted to say that, since there was no waiver pleaded, such evidence ought not to be considered.

(For other cases, see Trial, Cent. Dig. §§ 171-182, 252; Dec. Dig. § 75.)

3. PLEADING — RECEPTION OF EVIDENCE — WAIVER OF OBJECTION.

Failure to object to evidence at the time it is offered is a waiver of the objection that it is not admissible under the pleadings, unless a motion is made during the trial to strike out such evidence.

(For other cases, see Pleading, Cent. Dig. §§ 1438-1441; Dec. Dig. § 430.)

4. INSURANCE — ACCIDENT POLICY — RESTRICTIVE PROVISION—VALIDITY.

A provision in a contract of insurance, to the effect that no action at law or suit in equity shall be commenced before three months, nor after six months, from the date on which affirmative proof of accident must be furnished to the company, is repugnant to the provisions of section 3321, Rev. Codes, which provides that every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings and the ordinary tribunals, or which limits the time in which he may enforce his rights, is void.

(For other cases, see Insurance, Cent. Dig. §§ 1540, 1544-1550; Dec. Dig. § 622.)

* Decision rendered, Jan. 2, 1914. Rehearing denied, Feb. 16, 1914.
138 Pac. Rep. 506.

Appeal from District Court, Shoshone County; Wm. W. Woods, Judge.

Action by Andy J. Douville against the Pacific Coast Casualty Company, a corporation, to recover on an accident policy. From judgment for plaintiff, defendant appeals. Affirmed.

James A. Wayne, of Wallace, for Appellant.
Featherstone & Fox, of Wallace, for Respondent.

ROEH *vs.* BUSINESS MEN'S PROTECTIVE ASS'N OF DES MOINES.*

(Supreme Court of Iowa.)

1. INSURANCE—BENEFIT CERTIFICATE—CONSTRUCTION.

A provision of a certificate of a mutual assessment association provided that the association should not be liable for an injury or death caused by the discharge of a firearm unless the accidental character thereof be established by the testimony of one eyewitness other than the member. *Held*, that its purpose was to remove the presumption of accident, and, though not necessarily requiring that the witness should have seen the exact manner of the discharge, it did require his presence at or near the scene, and his direct observation of such facts and circumstances connected with the immediate transaction as of themselves would indicate that the shooting was accidental.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.)

2. INSURANCE—ACTION ON POLICY—EVIDENCE.

In an action on an insurance certificate, evidence *held* insufficient to show that the insured's death caused by a gunshot wound was accidental, within a provision of the policy requiring it to be established by at least one eyewitness, other than insured, that it was accidental.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

3. CONTRACTS—BENEFIT CERTIFICATE—VALIDITY—PUBLIC POLICY.

A provision in a benefit certificate of a mutual benefit association providing that the association shall not be liable for death caused by a discharge of a firearm unless the accidental character thereof be established by one witness other than insured is not contrary to public policy, in that it attempts to modify and control the procedure of courts of justice.

(For other cases, see Contracts, Cent. Dig. §§ 616-632; Dec. Dig. § 129.)

Appeal from District Court, Jackson County; M. F. Donegan, Judge.

Action upon a benefit certificate in the defendant association. The defendant denied liability upon grounds which will be referred to in the body of the opinion. The case was tried to the court without a jury, resulting in a judgment for plaintiff for the amount of the certificate, with interest, and defendant appeals. Reversed.

* Decision rendered, Feb. 19, 1914. 145 N. W. Rep. 479.

Dunshee & Haines, of Des Moines, for Appellant.
 Charles M. Thomas, of Maquoketa, and G. E. Hilsinger, of Sab
 for Appellee.



**GENERAL ACCIDENT, LIFE & FIRE ASSUR. CORPOR
 TION, LTD., vs. RICHARDSON.***

(Court of Appeals of Kentucky.)

1. INSURANCE—ACTIONS ON POLICIES—QUESTIONS FOR JURY.

In an action on an accident policy, defended on the ground of false representations in the application, where insured testified that he informed the insurer's agent fully as to previous injuries and treatment therefor, while the agent testified that he wrote insured's answers in the application literally as they were given by insured, it was left to the jury whether, without fraud or bad faith on the part of insured, the agent, with knowledge of the facts, wrote in the application answers that were false or incomplete.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

2. APPEAL AND ERROR—INSURANCE—FALSE REPRESENTATIONS—MISTAKE OF AGENT.

Where insurance agent, with full knowledge of the facts, writes in application untrue answers to the questions therein propounded, company is estopped to assert or rely upon such misrepresentations in the absence of fraud or bad faith on the part of the insured, and hence, where the evidence was conflicting as to whether insured made a full disclosure, and whether, without fraud or bad faith on his part, the agent wrote false or incomplete answers, an instruction to find for insurer if the answers were false was more favorable to the company than it was entitled to.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; I. Dig. § 1033; Insurance, Cent. Dig. §§ 999-1015; Dec. Dig. § 379.)

3. INSURANCE—ACTIONS—QUESTIONS FOR JURY.

In an action on an accident policy, where the physician who treated plaintiff for an abscess and performed the operation, testified that the abscess was of nontubercular origin, while, though a number of witnesses testified for defendant that the abscess was of tubercular origin, and could not have been caused by the accident, except a physician who assisted plaintiff's witness in performing operation based their opinion and judgment on hypothetical questions, the testimony of plaintiff's witness created a conflict in evidence within the scintilla rule, and made a question for the jury.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

4. EVIDENCE—HEARSAY—STATEMENTS OF THIRD PERSONS.
 In an action on an accident insurance policy, defended on the ground

* Decision rendered, Feb. 19, 1914. 163 S. W. Rep. 482.

{also representations, the testimony of a physician that matter taken from an abscess treated by him prior to the application was reported by the state board of health to contain a nontubercular germ should have been excluded as hearsay.

(For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.)

5. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action on an accident insurance policy, defended on the ground of false representations, the testimony of a witness who treated insured for an abscess prior to the application, that he caused an examination to be made of matter taken from the abscess, and that the state board of health reported the finding therein of a nontubercular germ known as staphylococcus, though hearsay, was not prejudicial where it appeared that such germ and tubercular germs might exist together, and the physician stated other grounds for his diagnosis of the nature of the abscess, and also that insured had apparently completely recovered after such examination.

(For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.)

6. TRIAL—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In an action on a policy insuring against loss resulting directly or independently "of all other causes" from bodily injuries effected through external, violent, and accidental means, an instruction to find for plaintiff if the injury resulted directly, approximately, and independently "of all other direct and proximate causes" in loss of time, though subject to the criticism that it permitted a recovery, though insured had, as claimed, a tubercular disease, and was in such physical condition that the slightest bruise would result in disability, was cured by an instruction to find for defendant if the disability was caused directly or indirectly, wholly or in part, from any bodily defect, disease, or infirmity, especially where the court defined the terms "direct and proximate cause" to mean such as directly produced or contributed to produce the injury or disability complained of, in whole or in part, and of which the injury or disability was the natural and probable consequence.

(For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.)

7. TRIAL—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In an action on an accident policy, defended on the ground of false representations by insured, an instruction to find for insured if, at the time of the issuance of the policy, he was not afflicted with any disease, and had no tubercular infection, was not erroneous as denying insurer the right to avail itself of its claim of false and material representations where the jury were further instructed to find for defendant if they believed the answers in the application were false.

(For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.)

Appeal from Circuit Court, Warren County.

Action by Zelmer E. Richardson against the General Accident, Life & Fire Assurance Corporation, Ltd. From a judgment for plaintiff, defendant appeals. Affirmed.

Guy H. Herdman and W. R. Gardner, both of Bowling Green, for Appellant.

Sims & Rodes, of Bowling Green, for Appellee.

ZEITLER vs. NATIONAL CASUALTY CO.*

(Supreme Court of Minnesota.)

1. INSURANCE—ACCIDENT INSURANCE—CONSTRUCTION OF POLICY.

In an action upon an accident insurance policy, the contract is construed and *held* to obligate defendant to make monthly payments of indemnity during the disability of the insured, not exceeding the period covered by the policy.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298, 1493; Dec. Dig. §§ 146, 597.)

2. INSURANCE—ACCIDENT INSURANCE—ACTION ON POLICY—SUFFICIENCY OF EVIDENCE.

The verdict of the jury to the effect that the disability for which plaintiff claims indemnity was the result of accidental injury, and that defendant waived strict compliance with the terms of the policy respecting notice and proof of injury, is sustained by the evidence.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

3. INSURANCE—ACCIDENT POLICY—COMMENCEMENT OF ACTION—PREMATURITY.

Defendant being under obligation to make monthly payments of indemnity and having waived formal notice of the injury or proof of disability, it is *held* that the action was not prematurely brought, notwithstanding a provision of the policy that no action could be commenced thereon until after the proofs have been furnished.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 623.)

4. INSTRUCTIONS.

The record presents no reversible error, either in the instructions or refusals to instruct the jury.

Appeal from District Court, Washington County; P. H. Stolberg Judge.

Action by John C. Zeitler against the National Casualty Company. Verdict for plaintiff. From denial of alternative motion for judgment or new trial, defendant appeals. Affirmed.

Einar Hoidal and H. L. Hoidal, both of Minneapolis (Henry C. Walters, of Detroit, Mich., of counsel), for Appellant.
H. H. Gillen, of Stillwater, for Respondent.

* Decision rendered, Feb. 6, 1914. 145 N. W. Rep. 395. Syllabus by the Court.

BUSINESS MEN'S ACCIDENT ASS'N OF TEXAS v. WEBB.*
(Court of Civil Appeals of Texas. Dallas.)

1. INSURANCE—EXECUTION OF CONTRACT.

Where the application under which an accident assessment policy was issued permitted applicant to reject and return the policy, if not satisfactory, and receive back his membership fee, there was no binding contract of insurance, where applicant examined and rejected the policy within the time provided, so that the association was not liable thereon.

(For other cases, see Insurance, Cent. Dig. §§ 195-202; Dec. Dig. § 130.)

2. INSURANCE—EXECUTION OF CONTRACT—ESTOPPEL TO DENY.

Where, under a provision of the application that if the certificate of membership issued was not satisfactory, applicant might return it to the association within three days and receive back his membership fee, the applicant refused to accept the certificate after examining it, so that the contract never took effect, the association was not estopped from denying liability thereon because it insisted on proof of loss and did not return the membership fee.

(For other cases, see Insurance, Cent. Dig. §§ 1071-1077; Dec. Dig. § 396.)

Appeal from District Court, Hill County; Horton B. Porter, Judge.
Action by Sallie D. Webb against the Business Men's Accident Association of Texas. From a judgment for plaintiff, defendant appeals.
Reversed and rendered.

Morrow & Morrow, of Hillsboro, and White, Cartledge & Graves, of Austin, for Appellant.

Wear & Frazier, of Hillsboro, for Appellee.

* Decision rendered, Feb. 14, 1914. Rehearing denied, Feb. 14, 1914. 163 S. W. Rep. 380.



INTERNATIONAL TRAVELERS' ASS'N vs. ROGERS.*

(Court of Civil Appeals of Texas. Dallas.)

1. INSURANCE—ACTION ON POLICY—SUFFICIENCY—EVIDENCE.

In an action on an accident policy to recover for the loss of an eye, evidence held to warrant a finding that plaintiff's eye was injured by external, violent, and accidental means.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

* Decision rendered, Jan. 24, 1914. Rehearing denied, Feb. 14, 1914. 163 S. W. Rep. 421.

2. INSURANCE—ACCIDENT POLICY—CONSTRUCTION—"ENTIRE."

Under an accident policy providing that, if the accident should result in the loss, within ninety days after an accident, of the "entire" sight of the eye, the insured shall receive not exceeding \$1,000, the word "entire" does not mean total blindness; but it is sufficient if the insured had practically lost the entire sight of the eye.

(For other cases, see Insurance, Cent. Dig. §§ 1312, 1313; Dec. Dig. § 527.)

(For other definitions, see Words & Phrases, vol. 3, p. 2410.)

3. INSURANCE—ACTION ON POLICY—EVIDENCE.

In an action upon an insurance policy, evidence held to show that the insured had lost the entire sight of an eye within the provision for a certain indemnity where the accident results in the loss of the entire sight of an eye.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

4. EVIDENCE—ACTION ON POLICY—ADMISSIBILITY OF EVIDENCE.

In an action upon an accident policy, the court properly refused to allow a physician to state that, in his opinion, the insured had not lost the entire sight of his eye.

(For other cases, see Evidence, Cent. Dig. §§ 2312, 2313; Dec. Dig. § 509.)

Appeal from District Court, Dallas County; J. C. Roberts, Judge.
Action by E. M. Rogers against the International Travelers' Association. From a judgment for plaintiff, defendant appeals. Affirmed.

Seay & Seay, of Dallas, for Appellant.

W. S. Bramlett and D. A. Frank, both of Dallas, for Appellee.

CASUALTY, SURETY AND MISCELLANEOUS.**UNITED STATES DISTRICT COURT.****D. NEW JERSEY.****VAN REEN***vs.***AETNA LIFE INS. CO.*****SPECIFIC PERFORMANCE—SUIT BY PERSONS NOT PARTY
TO CONTRACT—POLICY OF INDEMNITY INSURANCE.**

Defendant issued a policy by which it agreed to indemnify the owner of an automobile against "loss and/or expense arising or resulting from claims upon the assured for damages" on account of injuries caused in the operation of such automobile. The policy provided that defendant would, at its own cost, defend in his name any suit brought against the assured to enforce a claim for damages covered thereby, and that "no action shall lie against the company to recover for any loss and/or expense under this policy unless it shall be brought by the assured for loss and for expense actually sustained and paid in money by him after actual trial of the issue." *Held*, that the policy was one of indemnity to the assured only, and that a third person injured through his negligence, who recovered a judgment against him in an action by defendant, which judgment was wholly unpaid, could not maintain a suit in equity against defendant for specific performance to compel payment of the amount of the policy to him.

(For other cases, see Specific Performance, Cent. Dig. §§ 38-46; Dec. Dig. § 17.)

In Equity. Suit by Jacob Van Reen against the Aetna Life Insurance Company. Decree for defendant.

Herbert H. Gibbs, of New York City, for Complainant.
Collins & Corbin, of Jersey City, N. J., for Defendant.

BRADFORD, D. J.

The bill in this case was filed by Jacob Van Reen, a judgment creditor of Charles Brogan, against the Aetna Life Insurance Company, for the specific performance, as claimed by Van Reen, of the provisions of an automobile liability policy issued by the insurance company to Brogan on or about April 8, 1910, in consideration of the payment by the latter of a premium of \$99. While Brogan held the policy and it continued in full force Van Reen while traveling on a highway in New Jersey suffered serious accidental bodily injuries August 7, 1910, through

* Decision rendered, Dec. 9, 1913. 209 Fed. Rep. 691.

the negligent and careless use by Brogan of the automobile referred to in the policy. Van Reen brought an action in the Supreme Court of New York for damages for the injuries so received and recovered judgment against Brogan in the sum of \$20,000 as damages, and \$143.12 as cost of suit. Execution against Brogan was issued on the above judgment and returned unsatisfied prior to the commencement of this suit. The insurance company at its own cost undertook the defense of the New York action in the name and on behalf of Brogan from its commencement until and including the trial, and during the pendency of the action negotiated with Van Reen for a settlement of his claim, but did not pay or settle the same or any part of it. The insurance company was and is familiar with the proceedings in the New York action and had notice of the entry of judgment and the issuance and return of the execution and that such judgment is wholly unpaid. The policy in question provides, among other things, for the payment of the maximum sum of \$5,000 in case of accident resulting in bodily injuries or death to only one person, and also all costs taxed against the assured in any legal proceeding defended by the insurance company, and also all interest accruing after the entry of judgment therein, computed on the amount of the insurance which shall have become payable under the provisions of the policy. Condition M of the policy sets forth the measure of the indemnity which should become due from the insurance company, as follows:—

“M. The Company's liability for loss on account of an accident resulting in bodily injuries and/or death to one person is limited to five thousand dollars (\$5,000); and, subject to the same limit for each person, the Company's total liability for loss on account of any one accident resulting in bodily injuries and/or death to more than one person is limited to ten thousand dollars (\$10,000). The Company will, however, as provided in Conditions B and C hereof, pay the expense of litigation in addition to the sum herein limited, and will also pay all costs taxed against the Assured in any legal proceeding defended by the Company, and interest accruing after entry of judgment upon such part thereof as shall not be in excess of the limits of the Company's liability herein expressed.”

Conditions B and C are as follows:—

“B. If suit is brought against the Assured to enforce a claim for damages covered by this policy he shall immediately forward to the Company every summons or other process as soon as the same shall have been served on him, and the Company will, at its own cost, defend such suit in the name of and on behalf of the Assured.”

“C. The Assured, whenever requested by the Company, shall aid in effecting settlements, securing information and evidence, the attendance of witnesses and in prosecuting appeals, but the Assured shall not voluntarily assume any liability or interfere in

any negotiation for settlement, or in any legal proceeding, or incur any expense, or settle any claim, except at his own cost, without the written consent of the Company previously given except that the Assured may provide at the Company's expense such immediate surgical relief as is imperative at the time of the accident."

Van Reen seeks in this suit to compel the insurance company to pay to him on account of the judgment recovered by him against Brogan in New York the sum of \$5,000, together with interest, and the further sum of \$143.12, taxed costs as above mentioned.

The policy expressly runs to Brogan in consideration of the payment by him of the insurance premium, and was made for his benefit and not for that of Van Reen or any other person who should suffer bodily injuries through the negligent use of the automobile. Not only was Van Reen not a party to the contract of insurance, but under its terms and conditions the insurance company was under an obligation to make defense for Brogan against claims prosecuted by Van Reen against him. Further, it did not undertake to insure Brogan against mere liability to others for bodily injuries sustained through such negligent use, nor did it assume his liability or indebtedness in such cases, but only agreed to indemnify him against "loss and/or expense arising or resulting from claims upon the Assured for damages" on account of such injuries, subject to the conditions of the policy. Condition D is dominating and reads as follows:—

"D. No action shall lie against the Company to recover for any loss and/or expense under this Policy unless it shall be brought by the Assured for loss and/or expense actually sustained and paid in money by him after actual trial of the issue, nor unless such action is brought within two years after payment of such loss and/or expense."

Specific performance of a contract will be decreed only where its meaning is clear. So far as it is uncertain, whether from ambiguity or other cause, equity will not attempt to enforce it. It is not a legitimate function of the court to create or set up for enforcement a supposed contract into which the parties have not entered, or a contract which does not clearly disclose their contractual will. Much less will a court under the guise of specific performance compel one of the parties to a contract to do something in violation of its express terms and intent. Condition D, taken by itself, is wholly free from doubt on two vital points: first, that no action shall lie against the company to recover under the policy "unless it shall be brought by the Assured," and, secondly, then only "for loss and/or expense actually sustained and paid in money by him after actual trial of the issue." Van Reen is not the assured, nor has Brogan paid in money the judgment, or any portion of the judgment, or taxed costs in the New

York action. To permit the former successfully to maintain this suit would be in direct contravention of that condition as it reads. It is urged that it would be unreasonable and a hardship if the insurance company could not be directly sued by Van Reen, the liability of Brogan having been established by the New York judgment, instead of requiring Brogan to pay, at least to the extent of the insurance, that judgment with interest and costs, before resorting to the insurance company. This contention cannot be sustained. Persons competent to contract who have without the practice of fraud or deception on them entered into an agreement on sufficient consideration, cannot be relieved from its binding force on account of inconvenience or hardship involved in the practical operation of its clearly expressed terms. There is nothing in condition B or condition C requiring a construction or interpretation of condition D inconsistent with the plain import of its terms. In view of the undertaking by the insurance company to indemnify the assured against loss actually sustained and paid by him after actual trial of the issue, obviously nothing could be more reasonable and for its protection than that it should have a right to defend the action for the recovery of damages for bodily injuries "in the name and on behalf of the Assured," or that "the Assured, whenever requested by the Company, shall aid in effecting settlements, securing information and evidence, the attendance of witnesses and in prosecuting appeals, but the Assured shall not voluntarily assume any liability or interfere in any negotiation for settlement, or in any legal proceeding, or incur any expense, or settle any claim, except at his own cost, without the written consent of the Company," etc. I am unable to escape the conclusion that Van Reen is not entitled to the relief he seeks. This holding, I am satisfied, is required both by principle and an overwhelming preponderance of authority. The Supreme Court of Iowa in *Cushman vs. Fuel Co.*, 122 Iowa, 656. 98 N. W. 509, where a contract of a guaranty company with an employer provided that no action should lie against the company unless brought by the assured for a "loss actually sustained and paid in satisfaction of a judgment after trial of the issue," held that an unpaid judgment recovered by an injured employee against the employer could not be enforced against the company. The court said:—

"The obligation of the guarantee company was for the protection of the fuel company alone. The plaintiff was not a party to the contract, and had no legal rights thereunder. While the policy provided that the guarantee company might appear and defend for the fuel company in any action brought against it for personal injuries, such provision was for the protection of the guarantee company alone, and imposes no liability upon it beyond the terms of the contract. A court of equity can no more disregard the express provisions of the contract than could a

court of law, and neither can make a new contract for the parties which would impose a liability not originally contracted for; hence, whatever relief a court of chancery might grant plaintiff in any event, must of necessity be based upon and be determined by the contract which the parties have themselves made. The only obligation of the guarantee company was to indemnify the fuel company against a 'loss actually sustained and paid in satisfaction of a judgment after trial of the issue.' This covenant is as explicit and certain as language could well make it, and, as between the parties to the contract, no recovery could be had against the guarantee company because the judgment against the fuel company was not paid, and consequently the covenant was not broken."

The decision of the case in hand is controlled by *Allen vs. Aetna Life Ins. Co.*, 145 Fed. 881, 76 C. C. A. 265, 7 L. R. A. (N. S.) 958, in the circuit court of appeals for the third circuit. It is unnecessary to refer in detail to or cite other authorities.

Van Reen seeks to draw a distinction between his alleged right to compel payment by the insurance company of the costs taxed against Brogan in the New York action on the one hand, and, on the other, of the \$5,000 and interest on account of the judgment against Brogan. But no such distinction is permissible, as plainly appears from condition M in connection with the preceding portions of the policy.

The bill must be dismissed with costs and a decree entered accordingly.



SUPREME COURT OF NEW YORK.

APPELLATE DIVISION. FIRST DEPARTMENT.

PRESS PUB. CO.

vs.

GENERAL ACCIDENT, FIRE & LIFE ASSUR. CORPORATION.*

1. INSURANCE—LIABILITY INSURANCE—NOTICE TO INSURER—TIME FOR GIVING.

A policy, insuring plaintiff against liability for damage caused by the operation of certain automobiles, required plaintiff, upon the occurrence of an accident, to give immediate written notice thereof, and if thereafter any suit was brought against plaintiff to recover damages on account of injuries or damages covered by the policy, to immediately forward every summons or other process to the insurer, who agreed to defend the suit in behalf of plaintiff. One of the auto-

* Decision rendered, Feb. 6, 1914. 145 N. Y. Supp. 711.

mobiles collided with a wagon and injured the driver, and plaintiff's employee, in reporting the accident to it, stated the name of the injured person as "Pat Duffy." Notice of the injury was promptly given the insurer. Thereafter a summons and complaint in an action by "Patrick Duffy" were served, which fixed the time of the accident on account of which the suit was brought as four days before the policy went into effect. On the trial, over two years after the commencement of the action, plaintiff moved to amend so as to allege the date of the accident as within the period covered by the policy. The insurer was promptly notified of the motion to amend and of all the facts connected with the action, but it declined to defend because of the failure to immediately forward the summons and complaint upon the service thereof. *Held*, that the insurer was not relieved of liability because of such delay, since it was not until the amendment that any claim was made for damages covered by the policy, and had the summons and complaint been forwarded to the insurer, it would doubtless have returned them on the ground that the damages sought to be recovered were not covered by its policy.

(For other cases, see Insurance, Cent. Dig. §§ 1328-1336; Dec. Dig. § 539.)

2. INSURANCE—CONSTRUCTION OF POLICY—CONSTRUING AGAINST INSURED.

The law does not look with favor upon forfeitures in insurance policies, and refuses to give that effect to them unless a case is brought squarely within their provisions.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

Appeal from Trial Term, New York County.

Action by the Press Publishing Company against the General Accident, Fire & Life Assurance Corporation. From a judgment dismissing the complaint at the close of the evidence, plaintiff appeals. Reversed, and new trial ordered.

Argued before Ingraham, P. J., and McLaughlin, Laughlin, Dowling, and Hotchkiss, JJ.

Howard Taylor, of New York City, for Appellant.
Alfred M. Bailey, of New York City, for Respondent.

McLAUGHLIN, J.

[1] The defendant issued a policy of liability insurance to the plaintiff, insuring it from April 16, 1908, to April 16, 1909, against liability for damage caused by the operation of certain designated automobiles. One of the clauses of the policy provided that:—

"The assured upon the occurrence of an accident shall give immediate written notice thereof, with the fullest information obtainable at the time, to the corporation's head office at Philadelphia, Pa. If a claim is made on account of such accident, the assured shall give like notice thereof. If thereafter any suit, even if groundless, is brought against the assured to recover damages on account of such injuries or damages as are covered by this policy, the assured shall immediately forward to the corporation

every summons or other process served on him, and the corporation will, at its own cost, defend against such suit in the name and on behalf of the assured. The corporation reserves the right to settle any claim or suit. * * *

On the 12th of May, 1908, one of the plaintiff's automobiles specified in the policy, driven by one of its employees, collided with a wagon and team of horses with such force that the driver of the team was thrown to the ground and injured. The chauffeur at once reported the accident to plaintiff, stating that the injured person was "Pat" Duffy, and plaintiff immediately gave notice to the same effect to the defendant, in accordance with the terms of the policy. Nothing further was heard of the accident for several months, when the truck driver brought an action against the plaintiff, under the name of Patrick Duffy, to recover damages for injuries sustained by him, and alleged in the complaint that the accident occurred on or about April 12, 1908—four days before defendant's policy went into effect. Plaintiff did not, when the summons and complaint were served upon it, send the same to the defendant, or give notice of the presentation of the claim, or the service of such papers, but sent the same to the Travelers' Insurance Company, which had issued a policy of liability to the plaintiff covering the time when Duffy alleged he was injured, and it undertook the defense of the action. The Duffy action came on for trial the last of April or first of May, 1911. After the trial had been commenced, counsel for Duffy moved to amend the complaint by changing the date of the accident from April 12th to May 12th. Counsel for the Travelers' Insurance Company claimed surprise, and the court permitted a juror to be withdrawn and the cause returned to the general calendar for the purpose of permitting Duffy to apply at Special Term for leave to amend his complaint. Immediately upon this disposition of the action being made, plaintiff notified defendant by letter of the situation and of all the facts connected with the Duffy action, and asked it to take charge of the defense. Inclosed with the letter was the notice of motion for leave to amend, also a substitution of attorneys in blank for defendant. When the motion came on to be heard, defendant did not appear. The amendment was granted, and the trial postponed several weeks, and this defendant was given notice of all that had been done. It acknowledged receipt of the notice, but declined to undertake the defense on the ground that plaintiff had failed to comply with the terms of the policy in not immediately forwarding the summons and complaint when the same were served, but instead had retained them for upwards of two years. Plaintiff thereupon defended the action. Duffy had a recovery, and the same was paid by this plaintiff. It then brought this action to recover the amount paid and the expenses incident to the defense. The complaint was dismissed at the close of plaintiff's case, and it appeals.

The judgment appealed from is sought to be sustained upon the ground that the plaintiff violated the condition of the policy in that it did not, immediately upon the summons and complaint in the Duffy action being served upon it, forward the same to the defendant. It is not claimed but what the plaintiff in every other respect performed the condition imposed upon it by the policy. The defendant was given notice of the accident. There was nothing further for the plaintiff to do until a claim was made by Duffy or an action commenced. He never made a claim until he commenced the action under the name of Patrick Duffy to recover for injuries alleged to have been sustained on the 12th of April, 1908—four days before defendant's policy went into effect. The clause in the policy required that the summons and complaint be forwarded to defendant only in case action were brought to recover such "damages as are covered by this policy." Here, upon the face of the complaint, the damages sought to be recovered were sustained before the policy went into effect. They were therefore, if the complaint were true, not covered by the policy. Plaintiff, so far as defendant was concerned, had a right to assume that Duffy was injured at the time stated in his complaint. There was no obligation resting upon it to make an independent investigation for the purpose of ascertaining whether the plaintiff in that action were the Duffy so injured on the 12th of May, or whether the complaint correctly stated the date of the injury. Had such an investigation been made, it is quite obvious it would have served no useful purpose because if the summons and complaint had been immediately forwarded to defendant, it would have been justified in returning the same, and doubtless would have done so and declined to defend the action, on the ground that the damages sought to be recovered were not covered by its policy. Plaintiff was not bound to give this defendant notice of the commencement or pendency of the Duffy action until a claim was presented, or it had knowledge that that action was brought to recover damages covered by defendant's policy. The first time such claim was made was at the trial, when application was made to amend the complaint by alleging that the accident occurred on May 12th, and not on April 12th. Then this plaintiff was bound to act, and it did by immediately giving the defendant notice of the pendency of the Duffy action and all the facts in connection therewith, including the application to amend. It did all it was required to do, and even more, because after the amendment it was informed of that fact, and of the time when the action would be brought to trial. Having this information, the defendant was obliged to undertake the defense, and for its failure it became liable for breach of contract.

[2] The purpose of the policy was to indemnify the plaintiff, and to that end it should receive a reasonable construction. The one put upon it by the trial court, as it seems to me, is narrow

and unreasonable. The law does no look with favor upon forfeitures in insurance policies, and refuses to give that effect to them, unless a case is brought squarely within the provisions. *American Surety Co. vs. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; *McNally vs. Phoenix Insurance Co.*, 137 N. Y. 389, 33 N. E. 475; *Newburgh Light, Heat & Power Co. vs. Travelers' Ins. Co.*, 134 App. Div. 913, 118 N. Y. Supp. 865, affirmed 201 N. Y. 581, 95 N. E. 1134; *Frank Parmelee Co. vs. Ætna Life Ins. Co.*, 166 Fed. 741, 92 C. C. A. 403.

Whiteside vs. North American Accident Ins. Co., 200 N. Y. 320, 93 N. E. 948, 35 L. R. A. (N. S.) 696, upon which respondent principally relies, is easily distinguishable. There the policy contained a provision that the insured or his representatives should give written notice of the time, place, and nature of injury, or date of commencement of sickness, by mail within ten days thereof; otherwise a recovery could not be had. In an action to recover the sum stipulated to be paid weekly in case of sickness the complaint alleged that during the early part of the sickness plaintiff was delirious and unable to remember that he had the policy of insurance, but after the time stipulated in the policy he did give notice of such sickness. It was held that the complaint did not state a cause of action, since it appeared that the notice was not given within the stipulated time. The notice in that case was not given by reason of the mental infirmity of the insured, and it was held this did not excuse the giving of the notice, since he had agreed absolutely to give it, and could have provided against such a contingency.

In the case now before us the plaintiff was not required, by the terms of the policy, as we have seen, to forward to the defendant "the summons or other process served" upon it unless the damages sought to be recovered were "covered by this policy." It was not until the amendment of the Duffy complaint that a claim was made for damages covered by defendant's policy. The plaintiff then immediately gave the requisite notice, and forwarded the necessary papers to put this defendant in complete control of the defense of that action.

My conclusion, therefore, is that the complaint was improperly dismissed, and the judgment appealed from should be reversed and a new trial ordered, with costs to appellant to abide the event. All concur.

SUPREME COURT OF NEW YORK.**APPELLATE TERM. FIRST DEPARTMENT.****LOCOMOBILE CO. OF AMERICA***vs.***NICHOLS.*****1. INSURANCE—AGENCY FOR INSURER—COMPENSATION—RETENTION OF FUNDS OF INSURED—RIGHT TO RELIEF.**

An insurance company having insured certain automobiles belonging to plaintiff while in transit which were destroyed while in the carrier's hands, plaintiff agreed that, in consideration of an advancement by the insurance company of \$2,139 as a loan, to be repaid as recovery might be effected from the carrier, plaintiff would file a claim against the carrier and refund to the insurance company whatever was recovered up to the amount of the loan; the latter being responsible for all costs, attorney's fees, expenses, etc. The insurance company employed defendant to collect the claim, and he collected \$4,087.14, paying the insurance company \$2,139, retaining \$533.40 for his own services, and returning to plaintiff \$1,219.93. *Held*, that defendant, having retained the amount for his services without right as against plaintiff, and as the money in his hands belonged to plaintiff, it was entitled to recover the same in an action for money received.

(For other cases, see Insurance, Cent. Dig. §§ 111-114; Dec. Dig. § 84.)

2. INSURANCE—EMPLOYMENT—RIGHT TO COMPENSATION—PERSONS LIABLE.

Where an insurance company, having insured certain automobiles, destroyed while in the possession of a carrier, advanced \$2,139 to plaintiff pursuant to the policy and employed defendant to prosecute a claim against the carrier in which defendant was successful, his claim for compensation for his services was against the insurance company and not against plaintiff.

(For other cases, see Insurance, Cent. Dig. §§ 111-114; Dec. Dig. § 84.)

Appeal from City Court of New York, Trial Term.

Action by the Locomobile Company of America against Edwin Nichols. From a judgment of the City Court dismissing the complaint at the close of plaintiff's case, it appeals. Reversed, and new trial granted.

See, also, 140 N. Y. Supp. 1041.

Argued January term, 1914, before Lehman, Page, and Bijur, JJ.

Niles & Johnson, of New York City (William W. Niles, of New York City, of counsel), for Appellant.

Tipple & Plitt, of New York City (Arthur W. Clement and Wilson E. Tipple, both of New York City, of counsel), for Respondent.

* Decision rendered, Feb. 13, 1914. 145 N. Y. Supp. 941.

BIJUR, J.

It appears that plaintiff was the owner of two automobiles which were destroyed by an accident on the International & Great Northern Railroad Company in 1908. Prior thereto the Columbia Insurance Company had insured plaintiff against loss or injury to said automobiles. After the accident the plaintiff and the insurance company entered into an agreement expressed in a letter of the plaintiff to the insurance company reading as follows:

"Dear Sirs: In consideration of your advancing to us the sum of twenty-one hundred thirty-nine and 00/100 dollars (\$2,139.00) as a loan to be repaid without interest as recovery may be effected from the carriers in respect of the undernoted merchandise, we hereby agree to put forward a claim against the carrier and/or bailees of the said merchandise in whose hands the same received damage and upon receiving payment from them we hereby undertake to refund you whatever is recovered up to the amount of this loan, \$2,139.00. All over this amount to be retained by us. It is further understood and agreed that you are to be responsible for all costs, attorney's fees and expenses incurred in connection with the claim.

"Yours faithfully, The Locomobile Company of America,
"Treasurer.

"Description of goods referred to above: 2 Autos in wreck of Int'l & Gt. Northern R. R."

Thereupon the insurance company employed the defendant to collect plaintiff's claim against the railroad company, which he succeeded in doing, receiving therefor the check of the railroad company for \$3,553 and interest amounting in all to \$4,087.14. Defendant undertook to distribute this amount according to his own interpretation of the letter above quoted, paying the insurance company \$2,139, plaintiff \$1,219.93, and retaining for his own services \$533.40. Against this plaintiff protested and has brought this action to recover the balance claimed to be due to it. Substantially the controversy centers about the right of the defendant to retain as against the plaintiff any compensation for his services.

[1, 2] It was urged below, and apparently the learned trial court was of opinion, that, upon the facts disclosed, plaintiff could not maintain an action as for money had and received. In this I think the learned court was in error. The agreement between the plaintiff and the insurance company was in substance that, for purposes which we need not examine, plaintiff agreed to prosecute its claim against the railroad company for the damages suffered. Defendant was employed by the insurance company and not by the plaintiff, and, as the evidence discloses, was thoroughly aware of the fact that the claim was plaintiff's claim and that the moneys to be recovered were the moneys of the plaintiff. As these moneys are in his possession, plaintiff is, of course, entitled

to recover them from him. The dismissal of the complaint was therefore erroneous. The question whether defendant is entitled to retain any compensation for his services as against plaintiff was not directly decided, because of the dismissal of the complaint. It is quite evident, however, that defendant's claim for compensation must be directed to the one who employed him.

Judgment reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

MANHATTAN CO., INC., *vs.* UNITED STATES FIDELITY
& GUARANTY CO.*

(Supreme Court of Washington.)

1. PRINCIPAL AND SURETY—PAID SURETY—BUILDING CONTRACTOR'S BOND—DISCHARGE—GROUNDS—OVERPAYMENT.

A paid surety on a building contractor's bond was not relieved from liability because of an overpayment made by the obligee, either to the contractor or directly to the contractor's servants, where such payments were necessary to satisfy claims for labor and save the property from liens, and therefore did not operate to the prejudice of the surety.

(For other cases, see Principal and Surety, Cent. Dig. §§ 283-285; Dec. Dig. § 117.)

2. PRINCIPAL AND SURETY—BUILDING CONTRACTOR'S BOND—OVERPAYMENTS.

A small overpayment made by the owner to a contractor in the earlier stages of the work, not equal to an amount by which the contractor was credited for extra work, did not constitute a material change or violation of the contract so as to release the contractors surety from liability.

(For other cases, see Principal and Surety, Cent. Dig. §§ 283-285; Dec. Dig. § 117.)

3. PRINCIPAL AND SURETY—BUILDING CONTRACTOR'S BOND—RELEASE OF SURETY—TAKING OVER WORK.

Where an owner was required to pay the contractor's laborers in order to protect the property against liens by them, and the contractor continued with the work thereafter with every appearance of intention to complete it for a considerable time, and after his surety had been notified of the payment and the necessity therefor, such payment did not constitute a taking over of the work from the contractor by the owner, so as to relieve the surety from his liability on the bond.

(For other cases, see Principal and Surety, Cent. Dig. § 296; Dec. Dig. § 119.)

* Decision rendered, Jan. 17, 1914. 137 Pac. Rep. 1003.

Department 2. Appeal from Superior Court, King County; John E. Humphries, Judge.

Action by the Manhattan Company, Inc., against the United States Fidelity & Guaranty Company and another. Judgment for plaintiff, and defendant company appeals. Affirmed.

McClure & McClure, of Seattle, for Appellant.
Hechheimer & Herald, of Seattle, for Respondent.

BEMIS vs. PACIFIC COAST CASUALTY CO.*

(Supreme Court of Minnesota.)

1. INSURANCE—KNOWLEDGE OF AGENT—BINDING EFFECT—ESTOPPEL.

Knowledge of the agent of the insurance company, through whom the insurance was effected, of the actual situation of the risk covered by its burglary insurance policy is the knowledge of the company, and estops it from denying that the property so situate is not insured.

(For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. § 378.)

2. ESTOPPEL—PLEADING.

Facts going to prove estoppel in pais need not be pleaded.

(For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. § 110.)

3. INSURANCE—ACTION ON POLICY—QUESTION FOR JURY—EVIDENCE.

The question whether the warranty by the insured that the building, wherein was kept the property covered by the policy, was a private residence was for the jury.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

Appeal from District Court, Ramsey County; Frederick N. Dickson, Judge.

Action by John B. Bemis against the Pacific Coast Casualty Company. Directed verdict for defendant, and, from denial of new trial, plaintiff appeals. Reversed.

Chas. J. Andre, of St. Paul, for Appellant.
Ambrose Tighe, of St. Paul, for Respondent.

* Decision rendered, Feb. 20, 1914. 145 N. W. Rep. 622. Syllabus by the Court.

CLAY, STATE INS. COM'R, vs. EMPLOYERS' INDEMNITY CO. OF PHILADELPHIA.*

(Court of Appeals of Kentucky.)

1. INSURANCE—FOREIGN COMPANIES—CONDITIONS OF DOING BUSINESS IN STATE.

Under Ky. St. § 693, prohibiting any foreign insurance company, unless having a paid up capital stock of \$150,000, doing business in the state, provided that one may do any of the several kinds of insurance named in section 687, cl. 2, by making the deposit or deposits therein provided, it making such deposit may do such a kind of business without having such amount of capital stock.

(For other cases, see Insurance, Cent. Dig. §§ 13, 14; Dec. Dig. § 18.)

2. INSURANCE—FOREIGN COMPANIES—CONDITIONS OF DOING BUSINESS IN STATE—PAID UP CAPITAL.

A foreign insurance company authorized by Ky. St. § 693, to do any one of certain kinds of insurance business in the state on making specified deposits, required by section 687, cl. 2, of domestic companies, must also have the paid up capital of \$50,000, required of domestic companies; Const. § 202, providing no foreign company shall be authorized to transact business in the state under more favorable conditions than domestic companies.

(For other cases, see Insurance, Cent. Dig. § 12; Dec. Dig. § 17.)

Appeal from Circuit Court, Franklin County.

Action by the Employers' Indemnity Company of Philadelphia against Matt C. Clay, State Insurance Commissioner, for injunction. Judgment for plaintiff, and defendant appeals. Affirmed.

James Garnett, and Chas. H. Morris, both of Frankfort, for Appellant.

Helm Bruce, and Bruce & Bullitt, all of Louisville, for Appellee.

* Decision rendered, Feb. 3, 1914. 162 S. W. Rep. 1122.

LIFE.**UNITED STATES DISTRICT COURT.
D. MASSACHUSETTS.****HICKS****t.s.****PENN MUT. LIFE INS. CO. (No. 494.)*****1. ACCOUNT — EQUITY JURISDICTION — ADEQUATE REMEDY AT LAW.**

Where plaintiff sued for commissions alleged to be due him on premiums paid under certain insurance policies issued by defendant, in accordance with his contract, his claim being to recover money only, he had an adequate remedy at law, and could not maintain a suit for an account ing.

(For other cases, see Account, Cent. Dig. §§ 62-70; Dec. Dig. § 12.)

2. EQUITY—JURISDICTION—MULTIPLICITY OF SUITS.

Where an insurance agent sued under his commission contract for com missions due on premiums, and sought to recover, not only those which had accrued, but also asked that defendant be ordered to pay com missions under the contract as they might accrue thereafter, the bill was not sustainable as an exercise of equity jurisdiction, to avoid a multiplicity of suits.

(For other cases, see Equity, Cent. Dig. §§ 167-171; Dec. Dig. § 51.)

In Equity. Suit by J. Everett Hicks against the Penn Mutual Life Insurance Company. On motion to dismiss. Granted.

White & Bradbury, of Boston Mass., for Complainant.
Charles F. Rowley, of Boston, Mass., for Defendant.

DODGE, C. J.

[1] The plaintiff's claim to commissions is based wholly on a written contract set forth in his bill. If this be construed as he claims, commissions are now due him on premiums paid under certain policies issued by the defendant, and further commissions may become due on premiums to be paid in the future. His claim is one for money payments only.

His bill asks that the defendant render an account of all premiums already received by it since a specified date under policies of a kind described, and for payment of such amount as may be found due. All this he can obtain equally well in a suit at law. U. S. v. Bitter Root Co., 200 U. S. 451, 478, 479, 26 Sup. Ct. 318, 50 L. Ed. 550.

[2] He does not ask in so many words for specific perform

* Decision rendered, Jan. 26, 1914. 210 Fed. Rep. 464.

as to the commissions which may become due him, but he does ask that the defendant "be ordered to pay" them to him and to get commissions due hereafter. It is urged that at law he could not get commissions due; that, in order to get those accruing hereafter, other suits would be necessary after they had become due; and that jurisdiction may be taken in equity to avoid multiplicity of suits.

His rights under the contract, however, once established bring recovery for commission now due, no question except as to amount would remain open for controversy. There would be no damages incapable of ascertainment at law. Under such circumstances, there is no sufficient justification for the exercise of jurisdiction in equity and the interference with the defendant's right to jury trial therein involved. See General Electric Co. v. Westinghouse, etc., Co. (C. C.) 144 Fed. 458, 467-471.

The motion to dismiss is granted.



UNITED STATES DISTRICT COURT.

N. D. Ohio, E. D.

EBERHARD ET AL.

vs.

NORTHWESTERN MUT. LIFE INS. CO. (No. 90.)*

1. INSURANCE — FOREIGN CORPORATIONS — SUIT FOR ACCOUNTING—JURISDICTION.

Certain Ohio semitontine policyholders in a Wisconsin life insurance company were not entitled to maintain a bill in the Federal Courts sitting in Ohio, to compel an accounting of the corporation's funds applicable to such policies, and to restrain the corporation from holding an election of trustees, and from soliciting proxies for such election, and for the appointment of a receiver of the semitontine dividend funds involving a judicial interference with the internal management, administration, and control of the corporation, but complainants would be required to seek such relief in the courts sitting in the state of the corporation's domicile.

(For other cases, see Insurance, Cent. Dig. § 33; Dec. Dig. § 26.)

2. INSURANCE—LIFE INSURANCE COMPANIES—DUTY TO ACCOUNT—WHAT LAW GOVERNS.

A suit by semitontine policyholders of a Wisconsin life insurance company to compel each to account for semitontine dividend funds, and for other relief involving an interference with the internal management of

* Decision rendered, Jan. 19, 1914. 210 Fed. Rep. 520.

the company, is governed by the law of the state of the corporation's domicile.

(**For** other cases, see Insurance, Cent. Dig. § 33; Dec. Dig. § 26.)

In Equity. Suit by Charles W. Eberhard and others, for themselves and other semitontine life policyholders in the Northwestern Mutual Life Insurance Company, against such company, to compel an accounting of the funds of the company applicable to such policies, and for other relief. On demurrer to bill. Sustained.

Wing, Myler & Turney, of Cleveland, Ohio, for Plaintiff.
Squire, Sanders & Dempsey, of Cleveland, Ohio, and George H. Noyes, of Milwaukee, Wis., for Defendant.

DAY, D. J.

A demurrer was filed to the bill of complaint herein, and overruled on the theory that the relationship existing between the company and the complainants was not that of debtor and creditor, and that therefore the action would lie. The petition for rehearing was allowed, and the question is now presented that the demurrer should be sustained, inasmuch as the granting of the relief prayed for in the bill of complaint would require an inquiry into the internal affairs of the corporation, and that for such purpose the court sitting in Wisconsin is the only proper forum having the right and jurisdiction to entertain the suit. The complainants herein filed the bill as members of the corporation—

"not only on their own behalf, but also in behalf of those members of the defendant corporation who have held, or who are now holding, matured or unmatured semitontine policies issued by the defendant, who may wish to participate in the relief herein prayed against the Northwestern Mutual Life Insurance Company."

They allege that each is a member of the corporation, by reason of having had issued to each an insurance policy by the defendant company on the semitontine plan. The bill further alleges:—

"The defendant corporation since its creation has issued many thousands of policies on the semitontine plan, some of which have matured, and some of which are as yet unmatured, and that many thousands of such policies have been issued to residents of the aforesaid district, and that all of those to whom such policies have been issued are entitled to share with your orators in the trust fund arising from the saving made by the defendant, etc.

"That the said tontine dividend fund is a trust fund in which all of those to whom life insurance policies have been issued as cestui que trusts, and that in ascertaining the interest of each of those to whom policies have been issued, which policies have matured, it will be necessary and proper that an account be taken of the several amounts distributable, not only

to those whose policies have matured, but also to those whose policies have not matured, and to whom some portion of such fund will be distributable, in the event that they survive the tontine period provided in the policy, without forfeiting their interest in said fund.

"That many thousands, both in this district and elsewhere, to whom policies on the semitontine plan had been issued by the defendant company, have survived the tontine period pretending to the same, and who have kept all the conditions of the policy, to whom the defendant has paid an amount, falsely pretended and represented by said defendant to be the true and proper proportion of the tontine trust fund, but which, in truth and fact, was not the true and proper proportion payable to such policyholders, and each of them. * * * is entitled to their full share of said trust fund.

"And your orators show that in awarding the relief herein prayed for, it will be necessary to take into account the interest in said fund of all of those to whom policies have been issued on the semitontine plan by defendant, and your orators show that all of those to whom have been issued policies by the defendant on the semitontine plan have an interest in common with your orators in the correction of the method pursued by the defendant," etc.

The so-called reserve fund is then described, which is alleged to be placed in a fund, for the tontine dividend fund:—
"which, with its accumulations of interest, is held in trust, to be divided among those who may survive the tontine period, and who shall have paid the premium, according to their policy."

There follow allegations of misconduct on the part of the officers of the defendant company, in connection with said alleged trust fund, of an inequitable distribution of the semitontine funds; that the apportionment of this fund among the members entitled thereto is based upon erroneous principles, and there are other allegations of fraud, misconduct, and mismanagement on behalf of the company, its officers and trustees, in connection with said fund.

The bill prays:—

"That an account may be taken of the various amounts which have been diverted by the defendant from the tontine dividend fund in violation of its trust, and of the various amounts which have been wrongfully withdrawn from said fund by the defendant, and the amounts which have been earned and received as interest from the investment of said bond, and the amounts which have been wrongfully charged to said tontine dividend fund, under the guise and pretense that such amounts have been expended for the benefit of such fund, when in truth such charges were not based upon any expense

whatsoever pertaining to said fund, and of the savings made by said defendant on account of the loaning of premiums upon the basis of the mortuary tables, different from the actual rate of death of those insured, as experienced by the defendant among those to whom it issued policies on the semitontine plan, and the amounts that said defendant has withdrawn from said tontine dividend fund for the purpose of paying dividends to the holders of annual dividend policies, and the amounts paid to agents by the defendant, which have been charged to the tontine dividend fund, and that said defendant, its officers, agents, and servants, be enjoined from making further diversions of said fund, etc.; that the defendant be required to make a full and complete disclosure of the manner in which it has conducted its said trust with respect to said tontine dividend fund; that a *mandatory injunction be issued* commanding said defendant to restore to said fund all amounts found by a proper accounting and under the direction of the court, to have been wrongfully withdrawn and diverted from said fund; and that said defendant be *enjoined from holding election of its trustees* in the manner herein complained, and that it, the said defendant, be *enjoined from permitting its officers and agents to solicit proxies at such election*; and that the persons elected to be trustees of the defendant by the wrongful methods hereinbefore set forth, be *held and decreed not to be officers of said defendant corporation*; and that a receiver be appointed to hold and administer under the orders of this court said tontine dividend fund issue; that the trust under which said tontine dividend is held by the defendant for your orators and for those in whose behalf they complain, be in all respects, according to its intent and purpose, under the laws, conditions, and contract obligations created; and that under the direction of this court an account be taken for the interest in said fund of those who contributed thereto; and in the event that it should be found that said trust should be determined, that said fund be divided to such interest so ascertained."

The prayer also asks for a temporary injunction to be issued against the defendant:—

"restraining it from expending any part of said tontine dividend fund for any purpose other than those connected with the insurance issued by it on the semitontine dividend plan, and from expending any of said funds in and about the soliciting and writing of insurance upon the annual dividend plan, and from withholding from said fund, for any purpose whatsoever, any of the interest received by it from the investment made, and which hereafter may be made to said tontine dividend fund."

It is plain that the accounting asked for by the bill requires inquiry into the entire operation of the company and the handling of its funds. It requires an accounting as to dividends received,

and as to the payments made upon policies of every kind issued by the company. The bill asks for an injunction against the officers, agents, and trustees of the corporation, who are not parties to this suit, and prays for a receiver to take charge of the fund, and to distribute the same among the various policyholders.

[1] It has been frequently held by the courts that in cases similar to the one under consideration, the court could not grant the prayer of the bill without interfering with the internal management, administration, and control of a foreign corporation, and therefore would not take jurisdiction. *Mining Co. v. Field*, 64 Md. 151, 20 Atl. 1039; *Condon v. Mutual Reserve Fund Life Ass'n*, 89 Md. 99, 42 Atl. 944, 44 L. R. A. 149, 73 Am. St. Rep. 169; *Wilkins v. Thorne*, 60 Md. 253; *State ex rel. Minnesota Mutual Life Ins. Co. v. Denton*, 229 Mo. 187, 129 S. W. 709, 138 Am. St. Rep. 417; *State ex rel. Hunt et al. v. Grimm et al.*, 243 Mo. 667, 148 S. W. 868; *State ex rel. Hartford Life Ins. Co. v. Shain*, 245 Mo. 78, 149 S. W. 479; *Taylor v. Mutual Reserve Fund Life Ass'n of N. Y.*, 97 Va. 60, 33 S. E. 385, 45 L. R. A. 621; *Howard et al. v. Mutual Reserve Fund Life Ass'n*, 125 N. C. 49, 34 S. E. 199, 45 L. R. A. 853; *Royal Fraternal Union v. Lunday*, 51 Tex. Civ. App. 637, 113 S. W. 185; *Clark v. Mutual Reserve Fund Ass'n*, 14 App. D. C. 154, 43 L. R. A. 390.

The same principle has been applied by the courts in cases where the stockholder files a bill for an accounting against a corporation organized under the laws of another state where the accounting called for relates to the internal affairs and management of the corporation. *Kelly v. Thomas*, 234 Pa. 419, 83 Atl. 307; *Wolf v. Railroad Co.*, 195 Pa. 91, 45 Atl. 936; *McCloskey v. Snowden*, 212 Pa. 249, 61 Atl. 796, 108 Am. St. Rep. 867; *Bidwell v. Railway Co.*, 114 Pa. 535, 6 Atl. 729; *Kimball v. St. Louis & S. F. Ry. Co.*, 157 Mass. 7, 31 N. E. 697, 34 Am. St. Rep. 250; *Pierce v. Equitable Life Assurance Soc.*, 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433. Federal decisions to the same effect are *Republican Mountain Silver Mines v. Brown*, 58 Fed. 644, 7 C. C. A. 412, 24 I. R. A. 776; *Leary v. Columbia River & P. S. Nav. Co. (C. C.)* 82 Fed. 775; *Gaines v. Supreme Council Royal Arcanum (C. C.)* 140 Fed. 978; *Babcock v. Farwell*, 245 Ill. 14, 91 N. E. 683, 137 Am. St. Rep. 284, 19 Ann. Cas. 74; *Edwards v. Schillinger*, 245 Ill. 231, 91 N. E. 1048, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308.

The precise question raised by this demurrer was considered by the Circuit Court of Appeals for the Sixth Circuit in the case of *Castagnino et al. vs. Mutual Reserve Fund Life Ass'n et al.*, 157 Fed. 29, 84 C. C. A. 533. If the facts of the present case and the relief prayed for were similar to the facts and the relief prayed for in the case considered by the Circuit Court of Appeals the opinion of Judge Richards would be decisive in this case. However, in the case of *Castagnino vs. Mutual Reserve Fund Life As-*

sociation the facts are essentially different, and the relief prayed for is essentially different. The bill was filed in the Western District of Tennessee against the association to interpret and enforce the contract in the form of a policy of insurance issued by the defendant corporation for \$5,000 on the life of Emanuel Castagnino in favor of the other plaintiff, his wife. The defendant demurred, and the court below sustained the demurrer on the ground that the court could not grant the prayer of the bill without interfering with the internal management and administration of a foreign corporation. The Circuit Court of Appeals reversed the judgment and construed the suit to be one brought in order to construe and enforce the policy, and not one to interfere with the internal management of the company.

[2] In the case under consideration no hardship would be done the complainants if this suit were brought before the proper court in the state of Wisconsin. They are suing on behalf of themselves and others similarly situated and the relief asked for is such as to affect all of a similar class. If this were a suit asking only for the interpretation and the enforcement of a policy of insurance, the complainants might well have recourse to this court because it is only just and fair that a citizen of Ohio, who takes a policy in a foreign corporation, after the company had agreed that service of process in Ohio might be made upon it, should have ready resort to the courts of Ohio for redress. It is admitted by the complainants in their brief that the prayer of the bill may include many things which this court could not do. Such being the situation, the questions raised by the bill should be settled by the courts of the state in which the corporation is domiciled.

The law of Wisconsin furnishes the rule for the decisions of the questions raised. The complainants have every opportunity to have their rights fairly passed upon by the proper court, and, in view of the many questions raised and of the difficulties which would follow if this court would endeavor to carry into effect whatever conclusion it might reach, I must decline to take jurisdiction, and the demurrer will be sustained.

**COURT OF APPEAL OF CALIFORNIA.
SECOND DISTRICT.**

McEWEN

vs.

NEW YORK LIFE INS. CO.*

1. INSURANCE — FALSE REPRESENTATIONS — "SUBSTANTIALLY TRUE."

The representation by an applicant for insurance that the only illness, disease, or accident since childhood was one attack of typhoid pneumonia was not substantially true, where he had been struck by a mule, as the result of which one rib was fractured, causing the spitting of purulent matter, and totally disabling him for a period of nearly four months, followed by a partial disability for a longer period, since "substantially true" does not mean somewhat true, nor partially true, nor, on the other hand, true in every possible immaterial respect, but means true without qualification in all material respects, and hence, where the jury found such representations substantially true in answer to a special question, it was apparent that they misunderstood that term.

(For other cases, see Insurance, Cent. Dig. §§ 681-690, 694-696; Dec. Dig. § 291.)

2. TRIAL—SPECIAL INTERROGATORIES—FORM.

In an action on a life insurance policy, the court, in submitting special questions as to the truth of certain representations, should have submitted the question whether they were true, or, if he used the term "substantially true," he should have defined that term.

(For other cases, see Trial, Cent. Dig. §§ 840-842, 844, 845; Dec. Dig. § 352.)

3. INSURANCE — ACTIONS ON POLICIES — QUESTIONS FOR JURY.

Where the materiality of representations by an applicant for insurance depends upon inferences drawn from facts and circumstances proved, the question is one for the jury.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

4. INSURANCE — ACTIONS ON POLICIES — QUESTIONS FOR JURY.

Conceding that the rule that written answers by an applicant for insurance to written questions are always material has been changed by Civ. Code, § 2581, providing that the materiality of a representation is determined by the same rule as the materiality of a concealment, section 2565, providing that the materiality is to be determined, not by the event, but solely by the provable and reasonable influence of the facts upon the party to whom the communication is due in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries, and section 2573, providing that the language of a representation is to be interpreted by the same rules as the language of contracts in general,

* Decision rendered, Jan. 9, 1914. Rehearing denied by Supreme Court March 10, 1914. 139 Pac. Rep. 242.

the materiality of written answers is for the court, and it was error to submit their materiality to the jury, since the interpretation of a written contract is a question of law, and therefore the court, in determining such question, must likewise determine whether the representations so interpreted were material in that the insurance company was thereby influenced in forming its estimate of the disadvantages of the proposed contract, or in making its inquiries.

(For other cases, see *Insurance*, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

5. EVIDENCE—DECLARATIONS OF DECEDENT AGAINST INTEREST — STATEMENTS OF INSURER — “SUCCESSOR IN INTEREST.”

While the vested interest of a beneficiary in a life insurance policy cannot be affected by declarations made by insured unless a part of the res gestae, a beneficiary had no vested interest where insured reserved the right to change the beneficiary, and his admissions subsequent to the date of the policy tending to show the falsity of his representations in applying for the policy were admissible against the beneficiary as his successor in interest” under Code Civ. Proc. § 1853, providing that the declaration of a decedent having sufficient knowledge of the subject against his pecuniary interest is admissible as evidence to that extent against his successor in interest.

(For other cases, see *Evidence*, Cent. Dig. §§ 876-882; Dec. Dig. § 236.)

(For other definitions, see *Words and Phrases*, vol. 7, p. 6749.)

6. TRIAL—SPECIAL VERDICT—INCONSISTENCY WITH GENERAL VERDICT.

Where the special findings are not only inconsistent with themselves, but irreconcilable with the general verdict, the judgment will be reversed.

(For other cases, see *Trial*, Cent. Dig. § 856; Dec. Dig. § 358.)

Appeal from Superior Court, Los Angeles County; Wm. M. Finch, Judge.

Action by Rachel A. McEwen against the New York Life Insurance Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Edwin A. Meserve, of Los Angeles (Paul H. McPherrin, of Los Angeles, of counsel), for Appellant.

Murphy & Poplin, of Los Angeles, for Respondent.

SHAW, J.

This action was instituted by the mother of Charles B. McEwen, deceased, to recover the amount of a policy on his life issued by defendant on July 7, 1910, upon a written application made therefor by deceased on June 29, 1910. Judgment went for plaintiff, from which, and an order denying its motion for a new trial, defendant appeals.

The insured, who was twenty-eight years of age, died on November 20, 1910. Defendant resisted payment of the policy, alleging as a ground therefor that the insured had procured the issuance of the same by means of fraud, concealment, and misrepresentations made by him in answering written questions propounded to him by defendant, and upon the faith of which the policy was issued. Some of the questions and answers were as follows:—

(1) "What is your occupation? (Full details.) A. Proprietor of collecting agency.

(2) "How long have you been engaged in your present occupation? A. Ten years.

(3) "What was your previous occupation? A. Cattle business.

(4) "What is your daily consumption of wine, spirits, or malt liquors? A. No daily habit—occasional beer.

(5) "Have you at any time used any of them to excess? A. No.

(6) "Have you ever raised or spat blood? A. No.

(7) "What illnesses, diseases, or accidents have you had since childhood? (The examiner should satisfy himself that the applicant gives full and careful answers to this question.) A. Typhoid pneumonia. One attack in 1891; duration two months; severe; complete recovery.

(8) "How long since you consulted or have had the care of a physician? A. 1891; Dr. Thomas, Bucyrus, Ohio.

(9) "If so, for what ailment; name and address of physician? A. Typhoid pneumonia."

At the close of the questions, McEwen stated in writing that: "I declare, on behalf of myself and of any person who shall have or claim any interest in any insurance made hereunder, that I have carefully read each and all of the above answers; that they are each written as made by me; that each of them is full, complete, and true."

[1, 2] In addition to a general verdict, the jury were instructed to render special verdicts upon the answers given to the foregoing questions, and, in submitting the same to the jury in each case, was called upon to state whether or not the answers so given by McEwen in response to the questions were "substantially true." The use of the term "substantially true," without instructions restricting or explaining the same, gave to the jury in their consideration of the answers a wide latitude, and it is apparent from some of the answers given that they did not understand the meaning of the term. As illustrating such fact, the jury found that, in response to the question, "What illnesses, diseases, or accidents have you had since childhood; name of disease, number of attacks, date, duration, severity, results?" McEwen's answer thereto, "Typhoid pneumonia, one, 1891, two months, severe, complete recovery," was substantially true, and at the same time, by its special verdict found that in the month of July, 1909, he was struck by a mule, as a result of which one rib was fractured, causing the spitting of purulent matter, and totally disabling him for a period of nearly four months, followed by partial disability for a longer period. "'Substantially true' does not mean somewhat true, partially true, on the one hand, nor does it mean true in every possible and immaterial respect, on the other. It means true, without qualification, in all respects material to the risk." *France vs. Ætna Life Ins. Co.* 9 Fed. Cas. 657; *Campbell vs. New England Mutual*

Life Ins. Co., 98 Mass. 381; Jeffrey vs. United Order of Golden Cross, 97 Me. 176, 53 Atl. 1102. The question propounded to the jury, and upon which they were requested to render special verdicts, should have been whether or not the answers so given were true, or, in using the term "substantially true," the court should have instructed it as to the meaning of the term.

[3, 4] Not only did the court err as above stated, but likewise erred in submitting to the jury throughout its instructions the question as to whether or not the representations so made were material, and it was in effect told that, notwithstanding the fact that it might find the answers and representations so made by McEwen to be untrue, it should, nevertheless, render a verdict in favor of plaintiff, unless it found that such representations were material. Where the materiality of the representations depends upon inferences drawn from facts and circumstances proved, the question is one for a jury. A different rule, however, applies where the representations are in the form of written answers made to written questions. In such case the parties, by putting and answering the questions, have indicated that they deemed the matter to be material. Says May on Insurance, § 185: "The inquiry shows that the insurer considers the fact material, and an answer by the insured affords a just inference that he assents to the insured's view: The inquiry and answer are tantamount to an agreement that the matter inquired about is material, and its materiality is not therefore open to be tried by the jury"—in support of which text the author cites a number of cases. This rule has been modified by our statute, which provides that "the materiality of a representation" (section 2581, Civ. Code) "is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries." Section 2565, Civ. Code. "The language of a representation is to be interpreted by the same rules as the language of contracts in general." Section 2573, Civ. Code. The representations were in writing, and, where a contract is in writing, its meaning is not for the jury to determine, but its interpretation is a question of law for the determination of the court; hence, since the court must interpret the language in which the representation is made, the court must likewise determine whether, so interpreted, it is material in that the insurance company was by reason thereof influenced in "forming its estimate of the disadvantages of the proposed contract, or in making its inquiries." Conceding that by reason of this statute the rule laid down in May on Insurance, § 185, and followed by the courts of many states, is inapplicable, we are, nevertheless, of the opinion that under the statute the materiality of the representations was a question of law for the determination of the court, and not the jury.

[5] For the purpose of showing that the representations so made by McEwen were false, defendant offered evidence which tended to prove that on September 27, 1909, he had stated to a physician that he spat blood and had hemorrhages in the night and morning after coughing, and also that on October 22, 1910, in the trial of a case where he was charged with the commission of a public offense on July 26, 1910, he testified in extenuation of the alleged offense that he was intoxicated; that up to about ten days before October 22, 1910, he was a heavy drinker, and drank liquor to excess, resulting at times in a condition of prolonged intoxication. The court sustained plaintiff's objection to this evidence, holding that such declarations, though inconsistent with McEwen's representations made to defendant when applying for the policy, were, nevertheless, inadmissible against the beneficiary therein. This ruling is assigned as error. As we understand from the presentation of the case by counsel for both parties, this ruling was based solely upon the theory that plaintiff, named as beneficiary in the policy, had a vested interest therein, and hence her rights could not be affected by declarations made by the insured, unless they were part of the *res gestæ*. This principle is fully supported by the case of *Yore vs. Booth*, 110 Cal. 238, 42 Pac. 808, 52 Am. St. Rep. 81, as well as numerous cases in other jurisdictions. This case, however, cannot be deemed authority in support of respondent's contention, for the reason that by the express terms of the contract the insured reserved to himself the right of revocation as to the beneficiary. By the terms of the policy the company agreed to pay, upon proof of the death of Charles B. McEwen, the sum of \$15,000 "to Rachel A. McEwen, mother of the insured, beneficiary, with right of revocation," and immediately following, under the head of "Change of Beneficiary," the policy provides that, "when the right of revocation has been reserved, * * * the insured * * * may * * * designate a new beneficiary." In the case of *Waring vs. Wilcox*, 8 Cal. App. 317, 96 Pac. 910, this court held, reading from the syllabus: "Where a policy of life insurance reserves to the insured the right to change the beneficiary, upon written request therefore, the interest of a designated beneficiary prior to the death of the insured is that of a mere expectancy of an incomplete gift, subject to revocation at the will of the insured." To the same effect are the cases of *Hopkins vs. Northwestern Life Assur. Co.*, 99 Fed. 199, 40 C. C. A. 1; *Thomas vs. Grand Lodge*, 12 Wash. 500, 41 Pac. 882; and *Union Mutual vs. Montgomery*, 70 Mich. 587, 38 N. W. 588, 14 Am. St. Rep. 519. Since the insured had the right to change the beneficiary named in the policy, it must follow that plaintiff had no vested interest therein. Until McEwen's death, he might have named any one, including his estate, as beneficiary in the policy, and, this being true, the ownership of the policy must be deemed to have been vested in him. *Smith vs. National Benefit Soc.*, 51 Hun, 575, 5 N. Y. Supp. 521.

The right of plaintiff was that of a successor in interest to deceased, and hence, under the provisions of section 1853, Code Civil Procedure, proof of the declaration, if it tended to prove the falsity of the representations made by McEwen, should have been admitted. *Steinhausen vs. Preferred Mut., etc., Ass'n*, 59 Hun, 336, 13 N. Y. Supp. 36; *Thomas vs. Grand Lodge*, 12 Wash. 500, 41 Pac. 882.

[6] Having reached the conclusion that the case was, for the reasons given, tried upon an erroneous theory, as to which, however, we must concede the authorities are by no means harmonious, we deem it unnecessary to discuss numerous other errors assigned by appellant. Suffice it to say the special findings of the jury, some of which are not justified by the evidence, are not only inconsistent with themselves, but irreconcilable with the general verdict, which fact alone would warrant a reversal. *Di Vecchio vs. Luchsinger*, 12 Cal. App. 222, 107 Pac. 315; *Cox vs. Delmas*, 99 Cal. 124, 33 Pac. 836; *McAuley vs. Moody*, 128 Cal. 208, 60 Pac. 778. The trial court should have granted defendant's motion for a new trial.

The judgment and order are therefore reversed.

We concur: Conrey, P. J.; James, J.



SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK

—
CURTIS

vs.

NEW YORK LIFE INS. CO.*

A. INSURANCE—CONTRACT—ENDOWMENT POLICY—"INSURANCE CONTRACT."

Contract of pure endowment, whereby defendant insurance company agreed to pay testator \$5,000 if living March 18, 1910, but if he died before that time the contract should be void and the premium paid should remain the property of the company, was not a contract of insurance, within Rev. Laws, c. 118, § 3, defining an insurance contract as an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do an act valuable to the assured, on the destruction, loss, or injury of something in which the other party has an interest, etc.

(For other cases, see Insurance, Cent. Dig. §§ 172, 178; Dec. Dig. § 124.)
(For other definitions, see Words and Phrases, vol. 4, pp. 3674-3677.)

* Decision rendered, Feb. 28, 1914. 104 N. E. Rep. 553.

2. INSURANCE—ENDOWMENT POLICY—VALIDITY.

A contract of pure endowment, by which defendant agreed to pay testator \$5,000 if living March 18, 1910, the contract to be void if he died in the meantime, not being a contract of insurance, was not within the insurance law, and, not having been prohibited by any law of the state, was valid and enforceable.

(For other cases, see Insurance, Cent. Dig. §§ 250, 251; Dec. Dig. § 139.)

Report from Superior Court, Suffolk County; W. P. Hall, Judge. Action by William E. Curtis, executor of the estate of Samuel D. Jenness, against the New York Life Insurance Company. On report from the Superior Court. Judgment for defendant.

Samuel M. Child, of Boston, for Plaintiff. Ropes, Gray & Gorham, of Boston (Henry L. Shattuck, of Boston and S. G. Barker, of Watertown, of counsel), for Defendant.

DE COURCY, J.

On February 16, 1905, Samuel D. Jenness, the plaintiff's testate, who was then fifty-four years of age, applied to the defendant company for a five-year single premium endowment policy for \$5,000. The premium for this policy would have been \$4,636.45. Under it Jenness would have been entitled to \$5,000 if living at the end of five years from its date, and the beneficiaries named in the application would have been entitled to that sum in case of his death during the five-year period. After a prescribed medical examination this application was declined.

Subsequently Jenness made written application for pure endowment, the single premium for which was \$3,946.25. Pursuant to this application the defendant issued to Jenness, under date of March 18, 1905, the contract in controversy, whereby Jenness was to receive \$5,000 if living on March 18, 1910; and it provided that if he should die before that time, then and thereupon the policy should "cease and become null and void, and the premium paid" thereon should "remain the property of the company." He kept the policy until his death on April 10, 1909. His executor seeks in this action to recover the premium paid, contending that the contract is not an insurance policy as defined by R. L. c. 118 and that the defendant was not authorized to make any such contracts in this commonwealth with a resident thereof. These contentions were embodied in the rulings requested by the plaintiff and refused by the presiding judge, who thereupon directed verdict for the defendant.

[1] 1. R. L. c. 118, § 3, defines a contract of insurance as "an agreement by which one party for a consideration promises to pay money or its equivalent or to do an act valuable to the assured upon the destruction, loss or injury of something in which the other party has an interest." It also provides that with certain exceptions not here material, "it shall be unlawful for a company to make a contract of insurance upon or relative to any property or interest or lives in this commonwealth, or with any resident

thereof * * * except as authorized by the provisions of this chapter." This definition, substantially taken from the opinion of this court in Commonwealth vs. Wetherbee, 105 Mass. 149, was adopted by the Legislature in the Massachusetts Insurance Act of 1887, and has been retained since; the word "loss" being inserted after the word "destruction," in 1897. St. 1887, c. 214, § 3; St. 1894, c. 522; St. 1897, c. 66; R. L. c. 118, § 3; St. 1907 c. 576, § 3. The contract in question does not provide for payment upon the "destruction, loss or injury" of anything. Under it the defendant assumed the obligation of payment not upon the destruction or loss during the period named, but upon the continuance of the life of Jenness during that period. It is not what ordinarily is known as an endowment insurance policy, under which the sum named in the policy is payable to the insured himself, if he lives a certain length of time, and in the event of his prior death is payable to his beneficiaries, as in the ordinary life policy. Carr vs. Hamilton, 129 U. S. 252, 9 Sup. Ct. 295, 32 L. Ed. 659; Briggs vs. McCullough, 36 Cal. 542; State vs. Federal Investment Co., 48 Minn. 110, 50 N. W. 1028. Such a contract is in reality a combination of a contract of investment and one of term insurance; and it is the kind that Jenness first applied for and which the defendant declined to issue. The plaintiff is right in his contention that the policy in controversy was not a contract of insurance within the scope of our statutory definition.

[2] 2. A pure endowment contract, such as that involved in this case, not being a contract of insurance within the definition of R. L. c. 118, § 3, the next question is whether it is an agreement which our laws prohibit an insurance company from making in this commonwealth. In the case of Lord vs. Dall, 12 Mass. 115, 7 Am. Dec. 38, where the legality of a contract of insurance on a life was first decided in this state, Parker, C. J., in delivering the opinion of the court said: "This is a contract fairly made; the premium is a sufficient consideration; there is nothing on the face of it which leads to the violation of law; nor anything objectionable on the score of policy or morals. It must then be valid to support an action, until something is shown by the party refusing to perform it, in excuse of his nonperformance." At that time insurance contracts were usually on marine risks. The system since then has grown and broadened until it now furnishes protection and indemnity in almost every department of business and private life and enterprise. See St. 1907, c. 576, § 32, as amended by St. 1908, cc. 248, 509, and St. 1910, c. 499. Some of these contracts for many years have been a recognized part of the insurance business, although they do not come within our present statutory definition. This is especially true of contracts of pure endowment with return of premium. See Gould vs. Curtis, [1912] 1 K. B. 635; Prudential Ins. Co. vs. Commissioners of Inland Revenue, [1904] 2 K. B. 658; Carter vs. John Hancock Ins. Co., 127 Mass. 153. And one of the well-known forms of contract is that of an-

nuities—not within the technical meaning of the term, or incorporeal hereditaments created by grant—but in the modern sense of simple promise to pay a certain amount yearly. There is nothing in such contracts that offends against public policy or any principle of law. *Hayden vs. Snell*, 9 Gray, 365, 69 Am. Dec. 294; *Cahill vs. Maryland Life Ins. Co.*, 90 Md. 333, 45 Atl. 180, 47 L. R. A. 614; *Berry vs. Doremus*, 30 N. J. Law. 399. As was said by the court in *Mutual Life Ins. Co. vs. Smith*, 184 Fed. 1, 106 C. C. A. 593, 33 L. R. A. (N. S.) 439: We see very little to be urged against insurance of the nature in question, * * * that does not go to the merit of insurance itself. It is not unnatural that one should act upon the idea that, in the days when he is handling money, it is the part of wisdom to safeguard the period of old age, in which business and earning capacity will have become something of the past. Under modern conditions in the various industries, as well as in business and in official life, men are influenced to enter upon a particular work by various old-age safeguards which become operative at the end of a specified period of service." In the Smith Case the policies in question provided for deferred annuities, beginning in 1916, if the insured should be alive at that time. But what was there said seems equally applicable to a contract of pure endowment, as an annuity contract in effect is one providing for the payment of a series of pure endowments.

Although as we have seen, such pure endowment and annuity contracts are not contracts of insurance as defined by R. L. c. 118 § 3, it does not follow that insurance companies are prohibited by our law from writing them. That these companies are not confined to the making of the contracts defined by section 3 above cited, is apparent from other provisions of the chapter. Thus section 65 provides: "All corporations, associations, partnerships or individuals doing business in this commonwealth under any charter, compact, agreement or statute of this or any other state, involving the payment of money or other thing of value to families or representatives of policy and certificate holders or members, conditioned upon the continuance or cessation of human life, or involving an insurance, guaranty, contract or pledge for the payment of endowments or annuities shall be deemed to be life insurance companies, and shall not make any such insurance, guaranty, contract or pledge in this commonwealth, or to or with any citizen or resident thereof, which does not distinctly state the amount of benefits payable, the manner of payment and the consideration therefor, nor any such insurance, guaranty, contract or pledge, the performance of which is contingent upon the payment of assessments made upon survivors."

This recognition and regulation of policies conditioned upon the "continuance" of life, and of contracts for the payment of "endowments or annuities" is inconsistent with the view that insurance companies are forbidden to make such contracts. The rea-

sonable inference rather is that, subject to the limitations stated, they may be made in this commonwealth, even though they are not contracts of insurance as defined in section 3. In other parts, also, of the insurance statute are provisions indicating that annuity contracts as well as those of endowment, may be written under the Massachusetts law. See R. L. c. 118, § 11, cl. 3; Id. §§ 68, 76. And in the revision of St. 1907 (c. 576), although the definition of R. L. c. 118, § 3, is retained, frequent reference is made to endowment, pure endowment and annuity contracts, as a recognized part of the business of life insurance companies. See, for instance, sections 11, 69, 75, 76, 81. Section 80, as amended by St. 1908, c. 166, in dealing with the options open to the holder in case of surrender of the policy, provides that "in case of an endowment policy, if the sum applicable to the purchase of temporary insurance shall be more than sufficient to continue the insurance to the end of the endowment term named in the policy, the excess shall be used to purchase in the same manner nonparticipating paid-up pure endowment, payable at the end of the endowment term on the same conditions." And the same section, as further amended by St. 1910, c. 366, concludes in these terms: "The provisions of this section shall not apply to annuities, or to policies of pure endowment with or without return of premiums, or to survivorship insurance, and, in the case of a policy providing for both insurance and annuity, shall apply only to that part of the contract providing for insurance, but every such contract providing for a deferred annuity on the life of the insured only shall, unless paid for by a single premium, provide that in the event of the nonpayment of any premium after three full years' premiums shall have been paid, the annuity shall automatically become converted into a paid-up annuity for such proportion of the original annuity as the number of completed years' premiums paid bears to the total number of premiums required under the contract."

From what has been said it seems clear that while the contract of pure endowment in question is not one of insurance as defined by R. L. c. 118, § 3, nevertheless it is a legal contract and one which the Massachusetts laws do not prohibit an insurance company from making. In form it complies with the requirements of section 65 in distinctly stating "the amount of benefits payable, the manner of payment and the consideration therefor." As it is not a "contract of insurance" within the definition of our statute, the statutory requirements relative to medical examination and to the form of the application are not applicable and need not be considered. Nor is this a contract that can be rescinded as fraudulent or unconscionable. Jenness must have understood from the express terms of the application that the premium was not to be returned if he should die before the maturity of the pure endowment. The premium was based upon the standard American Experience Tables, and the loading added for expenses

was less than 4 per cent. The wisdom of the investment which he carried for more than four years was for him to determine. *Lee vs. Kirby*, 104 Mass. 420. Finally, that the making of the contract in controversy was within the charter power of the defendant corporation apparently is not questioned. Its amended charter, adopted under the New York Insurance Law of 1892 (Laws 1892, c. 690), provides: "Article III. The business of the company shall be insurance on lives and all and every insurance pertaining to life, and receiving and executing trusts and making endowments, and granting, purchasing and disposing of annuities, such kind of insurance being authorized under subdivision (1), § 70, of the Insurance Law."

We are of opinion that the rulings requested by the plaintiff so far as material were rightly refused. In accordance with the report, the verdict for the defendant is to stand.

Ordered accordingly.

SUPREME COURT OF NEW YORK.
APPELLATE DIVISION. FIRST DEPARTMENT.

ULMAN

vs.

NEWMAN ET AL.*

1. REFORMATION OF INSTRUMENTS — EVIDENCE — SUFFICIENCY.

In a suit to reform an endowment insurance policy, evidence held to show that the policy was taken out wholly for the wife's benefit with intent for her to receive the proceeds, whether her husband lived or died.

(For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-193 Dec. Dig. § 45.)

2. REFORMATION OF INSTRUMENTS—RIGHT TO REFORM.

Plaintiff had her husband's life insured, under an agreement that she should pay the premiums, and the policy should be her sole property. The agent who took the application secured the issuance of an endowment policy, which provided for payment to plaintiff only in case of her husband's death before maturity of the policy. Held that, as there were no intervening rights, plaintiff was entitled to a reformation of the policy so that the proceeds would come to her regardless of her husband's death or survival, for the issuance of a policy which was different from the one plaintiff desired was a constructive fraud upon her, regardless whether the insurance agent was the agent of plaintiff or the insurer.

(For other cases, see Reformation of Instruments, Cent. Dig. §§ 91-100 Dec. Dig. § 26.)

* Decision rendered, March 13, 1914. 146 N. Y. Supp. 696.

3. REFORMATION OF INSTRUMENTS -- GROUNDS FOR REFORMATION—MISTAKE.

Where it was the intention of a husband and wife that an endowment policy applied for by the husband should be payable to the wife at all events, and the insurer through mistake made the policy payable to the husband in case he survived until its maturity, a reformation of the instrument will be granted at the suit of the wife.

(For other cases, see Reformation of Instruments, Cent. Dig. §§ 69-71; Dec. Dig. § 17.)

4. LIMITATION OF ACTIONS—RUNNING OF STATUTE.

A wife took out a twenty-year endowment policy on the life of her husband under an agreement that she should pay the premiums and should receive the proceeds. Through mistake the insurer made the policy payable to the husband in case he survived until its maturity. The wife did not discover the mistake for over ten years, but during that time the husband asserted no rights in the policy. *Held*, that limitations had never begun to run, the policy not having matured, and that the wife was entitled to reformation.

(For other cases, see Limitation of Actions, Cent. Dig. §§ 337, 475, 476; Dec. Dig. § 96.)

Appeal from Special Term, New York County.

Action by Augustina Ulman against Max H. Newman, as receiver, and others. From a judgment for plaintiff, defendant receiver appeals. Affirmed.

Argued before Ingraham, P. J., and McLaughlin, Laughlin, Dowling, and Hotchkiss, JJ.

Charles J. Belfer, of Brooklyn, for Appellant.

Abraham P. Wilkes, of New York City, for Respondent.

HORCHKISS, J.

The policy is a \$5,000, twenty-year endowment, dated March 29, 1901. In case of death it is payable to plaintiff, and in case of Ira's surviving until 1921 it is payable to him. The judgment appealed from eliminates from the policy the phrases giving Ira an interest therein. The appellant's receivership dates from June, 1911. The action was begun February 26, 1912. The insurance company answered, denying knowledge of the facts on which the claim of reformation was based, and alleged that it was indifferent in the premises. The substance of the court's findings was as follows:—

[1] The parties were married in May, 1892. In March, 1901, Rosenberg, an insurance agent, urged plaintiff to have her husband's life insured. Thereupon plaintiff consented, and Ira gave his consent on the understanding that the policy was to be plaintiff's sole property and that she was to pay all the premiums. Plaintiff then instructed Rosenberg to obtain a policy of the general type in question. Rosenberg secured from the insurance company an application blank which he filled out and which Ira signed without reading, and thereupon the policy was issued and

handed to Rosenberg, who delivered it to plaintiff, who retained possession of it until possession was surrendered to appellant on his demand. Plaintiff did not examine the policy and was ignorant of its language until such demand. Plaintiff from her separate estate paid all the premiums, aggregating \$2,816.55. It was at no time plaintiff's intention to give to Ira, nor was it his intention to acquire, any rights or privileges with respect to the policy, and it was the design and purpose of both that plaintiff should have the sole benefit of its surrender value and endowment features as well as the benefit flowing to her as payee in case of death.

I think the findings of fact are supported by the evidence. Having regard for all the circumstances of the parties, my conclusion is that the policy was taken out wholly for the wife's benefit with intent to give her the proceeds whether her husband lived or died.

It is true there is no finding of fraud in fact or of mutual mistake on the part of plaintiff and the insurance company. Nor do I think this was necessary. The court found that Rosenberg was the agent of the insurance company and not of the plaintiff. This finding, although vigorously assailed, I think was justified. Rosenberg was evidently a solicitor of insurance and as such was under a statutory duty to procure a certificate of authority Laws 1889, c. 282, § 2. He was the medium and the sole medium through which the company's proposal to insure and the plaintiff's "application" for insurance ripened into the contract evidenced by the policy. But the point is not of determinative importance.

[2] The case may be made to rest on the doctrine of constructive fraud, resulting from Rosenberg's disobedience of plaintiff's directions to apply for a policy the benefits of which would run wholly to plaintiff, who paid the consideration therefor. To entitle plaintiff to relief, it makes little difference whose agent Rosenberg was. If, as the court found, he was defendant's agent, it was constructive fraud for the company to draft the contract in form different from plaintiff's instructions. *Hay vs. Star Fire Ins. Co.*, 77 N. Y. 235, 33 Am. Rep. 607; *Phoenix Fire Ins. Co. vs. Gurnee*, 1 Paige, 278, 19 Am. Dec. 431; *Weed vs. Schenectady Ins. Co.*, 7 Lans. 452; *Goldsmith vs. Union Mut. L. Ins. Co.*, 18 Abb. N. C. 325. If Rosenberg was plaintiff's agent, the result of his disobedience worked a similar fraud, because, by error and without her consent, plaintiff's property was diverted to a stranger, who paid nothing and has no rights in the premises. If the case were one presenting equities in either the insurance company or plaintiff's husband, the situation would be different; but here no rights are urged in opposition to plaintiff, save such as are set up in her husband's behalf, and he has none. For him, under such circumstances, to be decreed to be the beneficiary of what was agreed should be plaintiff's and for which she

alone has paid, but the legal title to which was, by error of another, put in his name, would be a fraud indeed. In *Gillespie vs. Moon*, 2 Johns. Ch. 585, 599, 7 Am. Dec. 559, one of the earliest cases in this state on the subject of reformation, Chancellor Kent on the authority of English cases said:—

"Defects in mortgages, contrary to the intention of the parties, have also been made good against subsequent judgment creditors, who came in under the party, * * * bound in conscience to correct the mistake."

See, also, *Gouverneur vs. Titus*, 6 Paige, 347.

Actual fraud is not necessary, and where, as here, there has been a mistake by one, and where the other party to the contract, being himself indifferent as to who should be the beneficiary of his obligation, has so drawn his promise as to cause it to run in favor of a stranger whom the other party never intended to be benefited, and who on no conceivable ground has any interest in the promise, and who is "bound in conscience to correct the mistake," I think his refusal or failure so to do presents a case of constructive fraud clearly within the principles on which jurisdiction to reform is based.

[3] But from another point of view, the case is clearly brought within the well-established rules for the reformation of written instruments. It has been found as a fact that Ira, plaintiff's husband, intended that the insurance should be wholly for plaintiff's benefit. The application was signed by Ira. In thus signing an application in the form supplied by Rosenberg and in securing a policy different from that agreed, the policy, as between Ira and plaintiff, was the result of mutual mistake, or mistake on plaintiff's part and constructive fraud on the part of Ira. In principle, the case is similar to *Haack vs. Weicken*, 118 N. Y. 67, 23 N. E. 133.

[4] Unless the action is defeated by the statute of limitations, the fact that plaintiff failed for over ten years to discover the error in the provisions of the policy is not of itself sufficient to bar her right to relief. *Treadwell vs. Clark*, 190 N. Y. 51, 82 N. E. 505; *Chittenango First Nat. Bank vs. Morgan*, 73 N. Y. 593; *Andrews vs. Gillespie*, 47 N. Y. 487. In *Welles vs. Yates*, 44 N. Y. 525, reformation of a deed was decreed after a delay of nineteen years. In *Gillespie vs. Moon*, 2 Johns. Ch. 585, 599, the mistake was not discovered for fourteen years. In *Hay vs. Star Fire Ins. Co.*, supra, *Bidwell vs. Astor Mutual Trust Co.*, 16 N. Y. 263, and *Anderson vs. Met. Life Ins. Co.*, 18 Wkly. Dig. 192, there was a delay of eight years, and in *Goldsmith vs. Union Mut. Life Co.*, supra, the delay was ten years. In *Avery vs. Equitable Life Soc.*, 117 N. Y. 451, 23 N. E. 3, a delay of fifteen years was held to deprive plaintiff of the right to equitable relief; but the circumstances were such as to clearly distinguish the case from the present. The principles governing laches as grounds for denying equitable relief in cases like the present have

been so recently declared by the Court of Appeals that no further discussion on this point is necessary. See *Groesbeck vs. Morgan*, 206 N. Y. 385, 389, 99 N. E. 1046; *Pollitz vs. Wabash R. R. Co.*, 207 N. Y. 113, 130, 100 N. E. 721.

The respondent concedes that, if the statute of limitations applies in favor of her husband, the defendant has succeeded to his right to plead it as a defense. Assuming the law to be such, I do not think the statute has run. The policy has not yet matured, and nothing has become payable under it, nor has the husband ever asserted any right to or interest in the policy adverse to plaintiff. Under such circumstances, the statute never began to run, or at least did not begin until this defendant set up a claim to the policy. *DeForest vs. Walters*, 153 N. Y. 229, 240, 47 N. E. 294; *Greenly vs. Shelmidine*, 33 App. Div. 559, 564, 82 N. Y. Supp. 176. Furthermore, inasmuch as the ground for the relief invoked rests on fraud, the statute would not begin to run until the fraud was discovered. *Gallup vs. Bernd*, 1 N. Y. Supp. 478¹, affirmed 132 N. Y. 370, 30 N. E. 743.

The judgment should be affirmed, with costs. All concur.

SUPREME COURT OF NEW YORK.
APPELLATE DIVISION. THIRD DEPARTMENT.

McCORMACK

vs.

SECURITY MUTUAL LIFE INS. CO.*

1. INSURANCE—LIFE INSURANCE—NOTICE.

Under Insurance Law (Consol. Laws, c. 28) § 92, requiring insurance companies to send notices that premiums are due, and providing that no insurance company shall declare any policy forfeited unless a written or printed notice, stating the amount of the premium due, the place and the person to whom it is payable, shall have been sent at least fifteen, and not more than forty-five, days prior to the day when the premium is payable, a notice that a premium is payable will not support a forfeiture, where it contained many alternative directions as to payment, and was encumbered by suggestions, intimations, and advice; the notice required by the statute being a danger signal which would not lull the insured into false security.

(For other cases, see *Insurance*, Cent. Dig. §§ 908-911, 913; Dec. Dig. § 354.)

2. INSURANCE—LIFE INSURANCE—POWER OF OFFICERS.

Where the field superintendent and local cashier of the defendant insur-

* Decision rendered, March 4, 1914. 146 N. Y. Supp. 613.

ance company consented to the reinstatement of a life policy after lapse in payment of premiums, with knowledge that the insured was hopelessly ill, such knowledge is chargeable to the company, and it cannot defeat recovery on the ground that a statement signed by the insured recited that he was in good health.

(For other cases, see Insurance, Cent. Dig. §§ 968-997; Dec. Dig. § 378.)

3. INSURANCE—LIFE INSURANCE—INCONTESTABILITY.

A life policy contained a clause providing that it should be contestable after the expiration of one year. It was forfeited for nonpayment of premiums, but was reinstated a few months later as of the date of the forfeiture, the company accepting the original check for the premium, which the insured's wife had negligently failed to mail. *Held*, that the policy as reinstated related back to the time of the forfeiture, and it became contestable within one year after forfeiture.

(For other cases, see Insurance, Cent. Dig. §§ 932, 933; Dec. Dig. § 365.)
Smith, P. J., dissenting.

Appeal from Trial Term, Albany County.

Action by Agnes L. McCormack against the Security Mutual Life Insurance Company. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before Smith, P. J., and Kellogg, Howard, and Woodward, JJ.

Rollin B. Sanford, of Albany, for Appellant.

Harvey D. Hinman, of Binghamton (Jay L. Gregory, of Binghamton, of counsel), for Respondent.

HOWARD, J.

In 1901 the Security Mutual Life Insurance Company wrote a policy for \$2,000 on the life of John A. McCormack. He was then a sound and healthy man; afterwards he was stricken with a fatal malady, with which he suffered for several years and then died. On December 12, 1910, a quarter-yearly premium became due and payable, with thirty days' grace. On November 12, 1910, a notice was sent out by the company and received by the assured, whereby the company undertook to apprise the assured of his obligation to make a premium payment on December 12th. Mrs. McCormack, the wife of the assured, the plaintiff herein, wrote a check on December 5th for the amount due, put it in an envelope, and directed the envelope to the company, but omitted to mail it. On February 13, 1911, the company notified the assured by letter of his default, and suggested that he arrange for a reinstatement of his policy. Mrs. McCormack visited the office of the local agent, Miss M. F. Hearley, the person named in the notice, for the purpose of inquiring into the matter. She was told by Miss Hearley that a reinstatement of the policy was necessary, and that Mr. McCormack must certify that he was then in good health. Mrs. McCormack told the agent, so she says, that no such certificate could be made, for her husband was then and had been for years in bad health. But the assured did ultimately sign such a

certificate, and was, in form, reinstated by the company. He died January 2, 1912.

[1] The defense to this action, brought on the policy, is that the policy was forfeited by the nonpayment of the premium due December 12, 1910, and that the reinstatement was procured by fraud and false statements. And so we must first inquire whether there was a forfeiture.

Section 92 of the Insurance Law requires insurance companies to send out to policyholders a notice that premiums are due. This section provides that no insurance company shall declare any policy forfeited:—

"unless a written or printed notice stating the amount of such premium, * * * due on such policy, the place where it shall be paid, and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured * * * at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, then due, shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided."

The notice which the company sent to the assured in this case reads:—

"Security Mutual Life Insurance Company, Binghamton, N. Y.

"Dear Sir: On or before Dec. 12th, 1910, a premium payment of sixteen and 85/100 dollars, for the regular quarter-yearly payment required to renew policy No. 34629 on the life of John A. McCormack in this company, will, if such policy be in force on that day, but not otherwise, become due and payable to the comptroller of the company at its office, Security Mutual Life Building, Binghamton, N. Y., and unless said premium shall be paid on or before said date, the policy and all payments made thereon will become forfeited and void, except that this notice shall not affect any right to paid-up or extended insurance, or to thirty days' grace, if provided for in the policy contract.

"The acceptance of any premium by the company after the date when due is subject to the condition that the insured is in good health, and an expressed warranty upon the part of the holder of the policy to that effect, and shall not be construed as a waiver of the conditions of the policy as to future payments, nor as establishing a course of dealing between the company and the holder of the policy.

"The sending of this notice shall not be held to waive any forfeiture or lapse of the policy, if any previous payment has not been made.

"No agent, collector, or other person, except the president,

vice-president, comptroller, or secretary, has authority to receive payment of a premium, after it becomes due, or to extend the time for the payment of a premium, or to grant permits, or to make, alter, restore, or discharge policy contracts, or to waive any condition thereof.

"Dated Binghamton, N. Y., Nov. 12th, 1910.

"Return this receipt with your remittance.

"Chas. A. La Due Secretary.

"All premiums are due at the office of the company in the city of Binghamton, N. Y., but for the convenience of policyholders payments may be made on or before the date when due to an authorized collector in exchange for the company's receipt therefor, signed by the secretary, and countersigned by the collector.

"Payment may be made to M. F. Hearley, 80 State Street, Albany, N. Y., authorized collector.

"Pay now and avoid overlooking it. M. F. H."

It is unnecessary to analyze this notice. It is sufficient to say that in our judgment it does not comply with the statute either literally or substantially; this is apparent on its face. Its form, its verbiage, its surplusage; its suggestions, intimations, and advice, intermingled with the language of the statute, are all repugnant to directness and simplicity. The notice is intended to be, as the plaintiff's attorney has well expressed it, a "danger signal." But the danger signal is here confused with a dozen other signals. There is no excuse for this; no necessity for it. If the insurance company wishes to convey this additional information to its policyholders, it must do so at other times than when sending out premium notices, and on other papers. But it is urged that the plaintiff received the notice and attempted to act upon it, and therefore if it was in some degree defective, it served its purpose, and the plaintiff was not harmed. But neither was the company harmed by the default in payment; it received the same amount of money and the same identical check which it would have received if the premium had been paid when due. And we cannot be certain that the plaintiff was not harmed; the peculiar and ambiguous language of the notice may have lulled her somewhat into repose. She may not have been spurred on by fear of forfeiture, as perhaps she would have been by the simple, direct language of the statute. The law abhors the forfeiture of insurance policies on technical grounds, and in order to effect a forfeiture, the statute must be strictly complied with. This court has already taken a position on this subject. *Flint vs. Provident Life & Trust Co.*, 157 App. Div. 855, 141 N. Y. Supp. 1119. There is no reason to change that position now. The notice must be held to have been defective and insufficient to work a forfeiture.

[2] Having reached the conclusion that the policy was never forfeited, it was not strictly necessary to make further examina-

tion of this case. It may not be unprofitable, however, to do so. Although the adjudicated cases in this state are by no means harmonious on the subject, the weight of authority is to the effect that agents of insurance companies cannot, by any statements which they may make, waive or alter the written conditions of policies. But that rule is not controlling here, for the situation before us presents a different question. We are now to determine whether knowledge on the part of agents becomes knowledge on the part of the company. That is the question before us now. The jury has found in this case that two agents of the company—a local agent and a "field superintendent"—had full knowledge of the condition of health of the insured at the time the policy was reinstated. The finding of the jury cannot be doubted, for it comports with the probabilities of the case and with common knowledge as to the methods of insurance agents. The field superintendent, by his title of office, as well as by his testimony, appears to have been a representative of much importance in the company. His jurisdiction extended all over the United States. His duties were general and supervisory in character. If he knew of reasons why a person ought not to be reinstated, it was his duty, so he tells us, to report such information to the company. Under these conditions it should be held that knowledge on the part of this agent was knowledge on the part of the company. It follows that, the company, having full knowledge of the condition of health of the assured at the time it reinstated his policy, it is estopped from setting up as a defense the false statements in his application for reinstatement. The company knew that Mr. McCormack was desperately sick. Notwithstanding this, with its eyes wide open, it reinstated his policy. It cannot now complain.

[3] And there is still another feature of this case worthy of consideration. The process of reinstatement here consisted of the acceptance by the company of the original check drawn by the plaintiff for the payment of the premium and the delivery by the company of the original receipt to the plaintiff. No new written contract was executed. The "reinstatement" was a reissuance of the old policy. That is, the policy having ceased to exist, as the company claimed, on December 12, 1910, it did not make out a new policy when it resumed relations with the plaintiff, but issued the old policy over again, and dated it, in effect, December 12, 1910. This must be so, otherwise the amount received by the company in premiums between December 12, 1910, and about February 18, 1911, was money accepted and retained by the company when there was no policy in existence. This plan avoided all gaps and interims. The old policy, issued anew, was to bear date December 12, 1910. That this was the distinct understanding of the parties is clearly apparent. This being so, the contestability clause must be held to apply to the "reinstated" policy.

with the same force and effect as it did to the original policy. This is equitable and just, and has been sanctioned by the Court of Appeals. *Teeter vs. United Life Insurance Association*, 159 N. Y. 411, 54 N. E. 72. Therefore it follows that after one year from December 12, 1910, the policy was contestable.

The judgment of the trial term should be reversed, and judgment for the relief demanded in the complaint rendered for the plaintiff, with costs.

We disapprove of the finding of fact made by the trial court, to the effect that the defendant duly rescinded the contract of insurance and reinstatement. All concur, except Smith, P. J., dissenting and Lyon, J., not sitting.

KELLOGG, J. (concurring).

The jury has found that the general field superintendent, at the interview in February, 1911, and the cashier at and prior to that time, understood the condition of the health of the insured. The trial justice has not disturbed those findings, but upon the theory that they had such knowledge, says the fact is immaterial under the authorities. The jury has believed the plaintiff rather than those officials. The plaintiff says the petition for reinstatement was made after the cashier knew of the ill health of the assured, and after plaintiff had informed her that she could not truthfully make the petition, and that when she explained that the check had been put in the envelope, and she was surprised to find that it was not mailed, the cashier said she was very sorry about it, and "she knew the company would do what was right." After the petition had been forwarded the cashier called the plaintiff to her office and introduced her to the general field superintendent, and said that he had brought the reinstatement paper to her from Binghamton, the home of the company. He delivered it to her and said:—

"knowing the condition of affairs, and knowing how very sick my husband was, that the company had done me a very great favor in reinstating him."

She had the right to believe, and evidently did believe, that he came to her as the representative of the home office to close the transaction with her. He had a general supervisory power over agents and to look out for the interest of the company wherever he is. He says:—

"that if he knew an applicant was not entitled to reinstatement, it would be his duty to report the facts to the company at once."

If he was intrusted by the home office with a reinstatement to deliver, and delivered it to the party known by him to be in ill health, he bound the company, where the party has relied upon his acts. The plaintiff evidently had no exact knowledge of the powers of the superintendent or the cashier. She may have exaggerated the authority of the cashier, as over her desk, in large

letters, was the placard "Security Mutual Life Insurance Company." That fact, and the fact that the superintendent brought the reinstatement papers from the home office, undoubtedly caused her to believe that she was dealing with the company. The correspondence between the cashier and the company with reference to the petition, the reinstatement, and the check is not in evidence. It was her duty to inform the company of the known condition of the insured. We must assume that she performed that duty, in the absence of proof to the contrary. There is no proof that she and the superintendent failed to perform their duties to the company. The medical examiner says he did not know, but the correspondence was not with him, and the superintendent did not report to him. The petition was simply handed over to him by the company for his consideration. If the company felt that under the circumstances it was not just or wise for it to contest its liability upon technical grounds, evidently it would not have informed the medical examiner, as his approval was desired. If the plaintiff is telling the truth about the attempt to mail the check and the reinstatement, the company would at least have been acting very technically and shortsightedly if it had refused reinstatement. The insured was helpless and failing in strength from day to day; the insurance was constantly in the mind of himself and wife; the default was purely accidental. If the company did not have knowledge of the condition of the health of the insured, the circumstances were such that it is estopped by the acts of its representatives under the circumstances shown.

At the time of the default the policy had a surrender value of \$900; there was a note against it of \$282. The husband was in a hopeless condition, and clearly could survive but a short time. If the company had refused reinstatement, it would have been easy for her, in his condition of health, to borrow the amount of the loan upon the strength of the paid-up policy, which would have resulted, at the worst, in her receiving \$618. The plaintiff had no intention to defraud the company. She was acting with its representatives, who knew the facts as well as she did; she believed they were honestly representing the company, and in fact were the company.

The cases relied upon by the respondent indicate that the cashier had not the power to bind the company by knowledge which she had and did not communicate to the company. We need not quarrel with them, for the fair inference is that the company had the knowledge. If the general field superintendent can bring from the home office and deliver a reinstatement to a dying man, under circumstances which render such delivery just and reasonable, and the company can avoid the effect of it after the assured, relying upon it, has allowed the time to obtain the surrender value on the policy to lapse, then technicality prevails over justice. I think the verdict of the jury, and the inferences fairly coming

from it, indicate that the company had knowledge of the condition of the insured at the time it received the check for the premium in dispute, and that it is therefore liable on the policy.

The company received a check which had been drawn in December, and signed the receipt prepared for the December payment, giving it the date of December 10, 1910, and marking it "Reinstated." It was practically ignoring the fact that there had been a default, and was treating the matter as if the check had been received in due course of mail. It was not going too far, under all the circumstances, to say that the reinstatement was dated back as of December 10, 1910, and under the terms of the policy was incontestable.

In addition to the criticisms on the notice made by Justice Howard, it should be stated that the notice is conditional upon its face. It states that the premium will be due upon a certain day, if the policy is in force on that day. Why throw a doubt upon the validity of the policy? Why leave it to the assured to determine whether the premium is due on that day or not? The law required the company to give notice of the fact, and did not intend that whether the premium was due or not should be worked out in the mind of the insured. The law contemplates by the notice that it should, in substance, be a demand for the payment of a certain sum of money on a day stated. A demand by a plaintiff, as a basis for a replevin, that the property be delivered to him if he is the owner, and if he is entitled to the possession, is not the unequivocal positive demand which the law contemplates. It is not an absolute requirement that the property be delivered as matter of right. The party making a demand must lay aside all doubt, and by positive act assert his right. The statute contemplates that the notice shall only be given to those who have a legal policy, and that it shall be a positive statement that a certain sum of money is due on a date specified, and that a failure to make payment will avoid policy.

The notice requires payment to the comptroller at Binghamton, and is signed by the secretary. A postscript, with the initials "M. F. H.", authorized the payment to any authorized collecting agent having a receipt. We do not know how many such agents there are. It also states that payment may be made to M. F. Hearley, authorized collector, at Albany. This was confusing. A technical effect is sought to be given to the notice; it, therefore, should comply with the law. The court cannot be called upon to plain it out. I, therefore, favor a reversal and judgment for the plaintiff.

SMITH, P. J. (dissenting).

Whatever may be the hardship of this particular case, this judgment cannot be reversed without revolutionizing the law of contracts. If the statute had required a notice for the payment of premiums to be in any particular form, it would so have pre-

scribed. That the notice required by the statute is embodied in the notice sent is unquestioned. That other matters included in the notice can be held to vitiate the notice given, in my judgment, does violence both to law and reason. The holding that the knowledge of the field superintendent, so-called, was the knowledge of the company, for the purpose of holding the company estopped, goes further than any case has ever gone in this state, or any other state, in the construction of life insurance contracts, and is a judicial abrogation of the contract made between the parties that a waiver can only be made by certain officers of the company of whom the field superintendent was not one. Furthermore, the holding that the false representation made in the statement for a renewal of the insurance did not vitiate such insurance not only goes beyond all authority, but is condemned by the reasoning in those cases which have held that the knowledge of the medical examiner in certain cases as to the condition of the insured may be held to estop the company in case of a false statement made by such medical examiner and innocently approved by the party seeking insurance. The opinion in the case of *Hook vs. Michigan Life Insurance Co.*, in 44 Misc. Rep. 478, 90 N. Y. Supp. 56, shows clearly that the rule of estoppel has never been applied to forbid companies to claim exemption by reason of false statements in the application for insurance, where the statement was made by the party himself, knowing the same to be false. This decision was approved unanimously by this court in 139 App. Div. 922, 123 N. Y. Supp. 1121.

Nor do I think the plaintiff is saved by the nonforfeiture clause in the contract. The reinstatement was in fact made in February of 1911. He died in January of the year following, so that one full year had not in fact passed since the reinstatement. There is not one particle of evidence to show that the company intended to make the reinstatement effectual as of any prior date. The check which was received was dated before the forfeiture. The check, of course, did not bear interest, and it might have been dated back. In any event its date is immaterial. The fact that the reinstatement involved the payment of premiums as upon the original contract cannot date back the renewal contract for the purpose only of making applicable the nonforfeiture clause, without facts authorizing a finding that it was so intended by both parties to the contract.

I, therefore, vote for an affirmance of this judgment.

SUPREME COURT OF NEW YORK.
APPELLATE DIVISION. FOURTH DEPARTMENT.

BENARD ET AL.

vs.

PROTECTED HOME CIRCLE.*

1. INSURANCE—LIFE INSURANCE—“SUICIDE.”

“*Suicide*,” as used in a suicide clause in a benefit certificate, implies a mental appreciation of the act of self-killing, which an insane person could not have.

(For other cases, see Insurance, Cent. Dig. § 1956; Dec. Dig. § 788.)

(For other definitions, see Words and Phrases, vol. 7, pp. 6764-6769; vol. 8, p. 7809.)

2. INSURANCE—MUTUAL BENEFIT INSURANCE—BURDEN OF PROOF—SUICIDE.

The defense of self-destruction is an affirmative defense the burden of proving which rests on the association in an action on a mutual benefit certificate, and hence it must show that the poison taken by insured was not taken by mistake.

(For other cases, see Insurance, Cent. Dig. §§ 1999-2002; Dec. Dig. § 817.)

3. INSURANCE — MUTUAL BENEFIT INSURANCE — SUICIDE CLAUSE.

A clause of a mutual benefit certificate exempting from liability for death from suicide would not be applicable if insured took poison through mistake.

(For other cases see Insurance, Cent. Dig. § 1956; Dec. Dig. § 788.)

4. EVIDENCE—PRESUMPTIONS—SANITY.

Sanity is presumed; that being the normal human condition.

(For other cases, see Evidence, Cent. Dig. § 83; Dec. Dig. § 63.)

5. EVIDENCE—PRESUMPTIONS—SUICIDE.

Since suicide is unlawful and immoral, it is presumed that insured's death was not caused by suicide.

(For other cases, see Evidence, Cent. Dig. § 81; Dec. Dig. § 60.)

6. INSURANCE—MUTUAL BENEFIT INSURANCE—ACTIONS—JURY QUESTION—CAUSE OF DEATH.

Evidence in an action on a mutual benefit certificate held to make it a jury question whether insured took poison by mistake or for suicidal purpose.

(For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.)

Appeal from Trial Term, Cattaraugus County.

Action by Martha Benard and another against the Protected Home Circle. From a judgment for defendant, plaintiffs appeal. Reversed, and new trial ordered.

* Decision rendered, March 4, 1914. 146 N. Y. Supp. 232.

Argued before Kruse, P. J., and Robson, Foote, Lambert, and Mernell, JJ.

Henry Donnelly, of Olean, for Appellants.
George A. Larkin, of Olean, for Respondent.

LAMBERT, J.

This is an action to recover upon a contract of life insurance issued by the respondent, upon the life of George Benard. The issuing of the certificate, the payment of all premiums due, and the death of the insured are all conceded. The defense is based upon the conceded fact that Benard died from carbolic acid administered by his own hand. In this connection, there is invoked a suicide clause in both the certificate of insurance and in the by-laws of the respondent. Both these clauses are set forth in full, in the answer.

Plaintiffs do not attempt to combat the proof that the insured met his death from self-administered carbolic acid, and that conclusion is required from the evidence. But to escape the consequences of the provisions in avoidance of the policy plaintiff advance two arguments.

[1] It is first urged that the defense in avoidance is affirmative in character and that its burden rests upon the respondent; that respondent, in its answer, has urged the sole defense of suicide; that the act of suicide, under our decisions, implies and requires that the suicide be a sane person, capable of appreciating the character and consequences of his acts; and that the evidence in this case presents a question of fact as to whether or not the insured was possessed of that degree of mentality. It is true that our Court of Appeals has held that an insane man cannot commit suicide. That suicide implies a mental appreciation of an act such as an insane man could not have. Meachem vs. Association, 120 N. Y. 242, 24 N. E. 283; Shipman vs. Home Circle, 173 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347. But this entire argument rests upon the narrow construction of the answer, as raising solely the defense of suicide, in its strict sense. I cannot accede to that construction of this pleading. The answer pleads the self-destruction clauses of both the by-laws and the certificate. Such clauses, as will be seen from an examination of them, are sufficiently broad to void this policy regardless of the mental condition of the insured, and it therefore seems to me that, in asserting "suicide" as a defense, that defendant should be deemed to have used that term in its colloquial sense as embracing all acts of self-destruction, regardless of the mental condition of the subject.

[2, 3] The second argument of the appellant is somewhat different and has more merit. It must be conceded that the defense of self-destruction is affirmative, and that the burden of sustaining it rests upon the defendant. In establishing that defense it was incumbent upon the defendant to negative the possibility of

this acid having been taken by mistake; for, if taken through error, then clearly the clause of the policy, in avoidance, is not applicable. It is urged by appellant that defendant has not met that burden, so conclusively as to resolve that question into one of law, rather than one of fact. The effect of the holding of the trial court, in directing a verdict for the plaintiff for the amount, only, of premiums paid, is that the evidence adduced, upon this affirmative defense, by both sides, permits but the single inference that the acid was taken intentionally. If such court was right in this conclusion, then such question was properly handled as one of law. But, if contrary inferences are permissible from such evidence, then such evidence should have been submitted to the jury.

Briefly stated, the evidence pertinent is as follows: The insured was a young man about thirty-eight years of age. He was a barber by occupation, owning his own shop. For some years his health had been poor, requiring him at various times to seek employment taking him into the outdoor air. He suffered great pain at intervals. His eyesight was poor; the sight of one eye being almost entirely gone. He was under a physician's care and customarily carried upon his person bottles of remedies, at least one of which was a four-ounce bottle. On the day of his death and about two hours previously thereto, he purchased of a druggist a four-ounce bottle of carbolic acid. He had made similar purchases before. That particular kind of acid was in use by him for sterilizing his barber tools. Just before his death he went into a saloon and with a pencil wrote something upon a piece of paper. He then called for a glass of beer and took it to a table in the place. Soon afterwards he called for another, saying that he had broken the first. Although no broken glass was to be seen, the bartender gave him another, which he took into the water-closet. He was next seen coming out of the closet, when he stated that he had killed himself. Of several persons, he requested a physician. One was summoned, but insured soon died. His lips, mouth, throat, and stomach were found to be burned with carbolic acid. The bottle of acid was found upon him, about one-third emptied. Upon his person, a letter was found addressed to his wife (presumably the one he had just been writing.) That letter is not produced, but two witnesses give its contents in general terms. They say it asked his wife to forgive him and that she take care of the children. One witness says it contained the statement that he could stand it no longer and that it expressed love for his wife. It further appears that previously the insured had had issued to him a revolver permit; that his wife, one of the plaintiffs, observed him standing in front of a looking glass with the revolver in his hand; and that she thereupon requested the cancellation of the permit and secured possession of the revolver.

By reason of his frequent use of carbolic acid, in his business, this particular purchase proves little in aid of defendant. It is as

compatible with mistake as with the intentional taking thereof. The circumstances of the taking of the acid (except the writing of the letter) are also easily to be reconciled with mistake, and perhaps his requests for a physician even tend to support the theory of mistake more strongly than that of intention. The letter affords the greatest argument in favor of the defendant. But the contents of that letter are hazily given, and, from the portion recollected, it may be that a contrary inference is drawn than would be present if the missive itself was before the jury, complete. Defendant finds further assistance in the previous occurrences with the revolver, urging a tendency to take his own life to be shown therefrom. It does not appear, however, that he ever made any actual attempt so to do, and the evidence is not of strong probative value, in and of itself.

On the other hand, the ill health and suffering of the insured, his poor eyesight, and his custom of carrying his physician's remedies in bottles of the size and character of the one containing this acid, are all circumstances that tend to weaken the theory of intention and to support that of mistake. There is no evidence of any preannouncement of intention to destroy himself, nor is there any circumstance shown which differentiates his life on that day from what it had been repeatedly and continuously theretofore.

[4, 5] Added to these circumstances is the legal presumption first, of sanity; and, next, against suicide. Sanity being the normal condition of mankind, its existence is presumed until the contrary is shown. Suicide being unlawful and immoral, the presumption obtains in favor of mistake rather than suicide and is conclusive until the contrary is shown.

[6] I am of the opinion that the defendant did not make out its defense of intentional self-destruction with such clarity as to permit the court to dispose of the matters as a question of law. It seems to me that a jury might find from all the circumstances that this acid was taken by mistake and in the belief that it was medicine proper to take. If I am right in this, then a jury question was presented and a reversal is required.

The judgment should be reversed, and a new trial ordered with costs to the appellant to abide the event. All concur.

SUPREME COURT OF NEW YORK.
APPELLATE DIVISION. FIRST DEPARTMENT.

GANS

vs.

AETNA LIFE INS. CO. OF HARTFORD, CONN.*

INSURANCE—POLICY—CONSTRUCTION.

Where an insured exercised his privilege of exchange contained in a five-year renewable term policy and exchanged it for an ordinary life policy bearing the date of the exchange, the second policy was not a mere continuation of the first, but created a new contract from its date; since term insurance and the ordinary life policy are essentially different, being based upon different considerations.

(For other cases, see Insurance, Cent. Dig. §§ 273-275; Dec. Dig. § 144.)

Appeal from Trial Term, New York County.

Action by Milton H. Gans, executor, against the Aetna Life Insurance Company of Hartford, Conn. From a judgment for plaintiff, and from an order granting an extra allowance, defendant appeals. Judgment and order reversed, and complaint dismissed.

Argued before Ingraham, P. J., and Laughlin, Clarke, Scott, and Hotchkiss, JJ.

Keyes Winter, of New York City, for Appellant.
Herbert H. Maass, of New York City, for Respondent.

HOTCHKISS, J.

On April 5, 1907, defendant issued its two "five-year renewable term" policies on the life of the deceased. Each of these policies provided that at its expiration it might "be *renewed and continued* for successive terms of five years each without medical re-examination," on payment of the premiums expressed to be paid during such respective renewal terms; also that each policy should be incontestable after one year from its date, and each contained a "sane or insane" suicide clause, limited to a similar period of one year. Each of the several policies also provided that at certain fixed dates, on payment of appropriate premiums, and without medical re-examination, it might be "exchanged" for a policy of a different kind. The "exchange" permitted was substantially as follows, for: (1) A policy in a form in use by the company at the time the term policy was originally issued, in which case the policy so to be issued should be dated as of the date of the original term policy, and the assured should reimburse the company for any difference between the amount of premiums already paid on

* Decision rendered, March 6, 1914. 146 N. Y. Supp. 453.

the term policy and the amount which would have accrued had the new policy been issued as of the date of the term policy; (2) a policy in a form in use by the company at the time of the "exchange," in which case such policy should be dated as of the date of the "exchange."

Shortly before the expiration of the first term of five years of the term policies, the deceased exercised his privilege to "exchange" the same for other policies, and thereupon signed and delivered to defendant an "application for changed insurance on my life," which among other things, contained an agreement on his part:—

"that the statements and answers in the application for said term policy shall be the basis of the new contract or policy herein applied for and form a part of the same, except that the kind of policy, amount of the same and the premium thereon shall be as specified below."

In pursuance of this application, defendant accepted a surrender of the term policies, and issued to the deceased the policies which are the subject of this action.

Each of these policies bears date of the day of the "exchange," and provides for the payment annually of a level premium for a period of thirty-six years, and is payable on the death of the assured, or at the expiration of said thirty-six years if he is then living. The policy also carried "health or disability" insurance, by the terms of which it was, among other things, provided that in further consideration of a small additional premium the defendant, under certain contingencies and on proof that the assured had become permanently disabled and incapacitated to perform any work, or had suffered the loss of certain members, and on surrender of the policy, would issue to the assured a contract to pay him certain sums of money, which obligation, however, was conditioned upon the fact that the disability or injuries of the deceased should arise "from causes originating after the delivery of this agreement." These later policies recite that they are "made in consideration of the application for this policy, which application is hereby made a part of this contract and in further consideration of the semiannual premium"; also "that this policy and the application herefor constitute the entire contract between the parties hereto and shall be incontestable after one year from its date." Each contains a clause voiding the policy in case of suicide within "one year from the date hereof * * * sane or insane." Within the year the deceased died by his own hand.

The trial court held that the policies in suit did not create a new contract, but were mere continuations of the original term policies. I think this was error. The original or "term" policies did not afford the assured insurance for the term of his natural life, but were expressly limited to "the term of five years from the date hereof and no longer except as hereinafter provided." The

scheme of such insurance is familiar. In the ordinary life policy the assured pays a level premium during the whole period, over which premium payments are extended. Under such policies the amount of premium paid during the earlier years is in excess of the sum actually needed for carrying the risk, which risk naturally increases year by year, with the result that the excess of premium paid during the earlier years provides a fund from which the deficiency incident to the later years is made up, which deficiency is termed "reserve." Term insurance is essentially different, being insurance for the specified term only; the premium being calculated on a basis which provides for such deaths only as occur during the term. The premium paid is "level" during the specified term only, and increases with each renewal term. The premium in the case of term insurance is consequently lower than in the case of straight life insurance, the premium in the former case carrying no reserve, being based upon a sort of "pay as you go" theory. See Willard's *The A B C of Life Insurance*, p. 53.

Policies of this description were before the courts in *McDougall vs. P. S. L. A. Society*, 135 N. Y. 551, 32 N. E. 251, and *Rosenplaenter vs. Provident Society*, 96 Fed. 721, 37 C. C. A. 566, 46 I. R. A. 473, which involved "one year renewable term" policies. The privilege of exchange given in the term policies in question afforded him, at his option, the right to take out a policy which would have borne a date identical with that of the term policy surrendered, but in that case it was expressly provided that the assured should pay:—

"the difference between the premiums already paid hereon for an amount equalling that of the new insurance and those that would have been required under the new policy, with 6 per cent interest."

But he did not elect to take this kind of policy, or to pay its cost. On the contrary, he elected to take the policies in suit, which it was expressly agreed "shall bear the same date as this policy," that is, the surrendered term policy. The distinction between the new policies and the old is further indicated by that portion of the latter in which the right is given to the assured to extend and keep alive the "term" insurance at the expiration of each term. The term policies say, "This policy upon its expiration may be renewed and continued for successive terms of five years each," but under the terms of the privilege for exchange, as accepted by the deceased, the assured completely abandons his term insurance, and elects to take a new contract of an entirely different character and based upon a new scheme and rate of premium; the new contract, according to the express terms of the "privilege," being purchased and paid for on the basis of the day of its date. The old contracts were not continued, nor were new policies issued based on any payment that had been previously made. On the contrary, the assured had already had full consideration for all the payments he had made under the term poli-

cies, and received new policies upon new and independent considerations, which considerations were themselves based upon the necessary cost to defendant of carrying the assured under the new kind of risk he had elected to take. That the policies in suit were intended to be new contracts operating from their date is further evidenced by that portion covering "health or disability insurance," which provided that the disabilities of the assured should arise "from causes originating after the delivery of this agreement." Could it be said that recovery could be had for a disability which clearly had its origin during any part of the previous five years when the term policies were in effect?

The situation here is entirely different from that appearing in *Dannhauser vs. Wallenstein*, 169 N. Y. 199, 62 N. E. 160, *McDonnell vs. Alabama G. L. Ins. Co.*, 85 Ala. 412, and *Cowles vs. Continental Life Ins. Co.*, 63 N. H. 300, where paid-up policies were issued without any new consideration, and in which cases the beneficiaries received no more than they were entitled to receive because of the considerations theretofore paid by the assured, and where the new liability assumed by the insurers was determined solely on the basis of such past considerations. The principle of *Barry vs. Brune*, 71 N. Y. 261, page 264, is the same as that of *Dannhauser vs. Wallenstein*, because in that case the new policies were issued in consideration of nothing more than "the premiums which had accrued and become payable on the original policies," which had elapsed; the new policies bearing the same numbers as the old policies, for which they were a substitute.

To effectuate this decision the eighteenth finding of fact, and the first, third, fourth, and sixth conclusions of law will be reversed. The word "not" will be struck out of the second and fifth conclusions of law, and as thus amended the findings of the trial court will be adopted as the findings of this court; the judgment and order will be reversed, with costs to appellant, and the complaint dismissed, with costs. All concur.



PEEBLES *vs.* EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN.*

(Supreme Court of Arkansas.)

1. TIME—COMPUTATION—FILING BILL OF EXCEPTIONS.

Where time is granted for the preparation and filing of a bill of exceptions, the expiration of the time is determined by the rule that the day on

* Decision rendered, Feb. 16, 1914. On rehearing, March 9, 1914. 164 S. W. Rep. 296.

which the order is granted is excluded, and the day on which the time expires is included.

(For other cases, see Time, Cent. Dig. §§ 11-32; Dec. Dig. § 9.)

2. INSURANCE—MUTUAL BENEFIT INSURANCE SOCIETY—DELIVERY OF CERTIFICATE — LOCAL CLERK — KNOWLEDGE—IMPUTATION TO SOCIETY—ESTOPPEL.

The constitution of defendant fraternal benefit society provided that a benefit certificate, after being issued, should be sent to the subordinate clerk, and, after being countersigned by him, should be delivered to the applicant while in good health. The applicant was required to sign a receipt attached to the certificate that he accepted the same; warranted that he had not been ill since his medical examination; was then in good health; and that he detached the receipt from the policy as accepted, in the presence of the clerk who was required to attest the same. *Held*, that the local clerk was not only the agent of the society to deliver the certificate, but was charged with the duty of ascertaining whether it ought to be delivered and take effect, and hence knowledge of such clerk that the applicant at the time of delivery was helpless in bed as the result of an accident by which his spine was injured, was imputable to the society, which, having thereafter accepted payment of assessments from insured, was estopped to deny that the policy was delivered while the applicant was in good health.

(For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.)

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by Samuel W. Peebles against the Eminent Household of Columbian Woodmen. Judgment for defendant, and plaintiff appeals. Reversed, remanded, and rehearing denied.

Coleman & Gantt, of Pine Bluff, for Appellant.
Taylor, Jones & Taylor, of Pine Bluff, for Appellee.



AMERICAN NAT. INS. CO. vs. MOONEY.*

(Supreme Court of Arkansas.)

1. INSURANCE — LIFE INSURANCE — PAYMENT OF PREMIUMS—APPLICATION OF SICK BENEFITS.

An amount due under a life policy for sick benefits, which was sufficient to pay the premiums until insured's death, should have been applied by the company for that purpose, and, if due, will be deemed to have been so applied to prevent a forfeiture for nonpayment of premiums.

(For other cases, see Insurance, Cent. Dig. §§ 913, 916-922, 924; Dec. Dig. § 360.)

2. APPEAL AND ERROR—RECORD—CONSTRUCTION.

The record, in an action on a life policy, showed that upon the production of plaintiff's sworn statement that she had not authorized the attorneys appearing for her to institute the action, and repudiated its institution,

* Decision rendered, Feb. 23, 1914. 164 S. W. Rep. 276.

defendant's counsel stated that he wished to move to dismiss, and that the court after asking witness several questions, announced its finding for plaintiff, whereupon defendant's counsel stated: "I haven't finished my case. I desire to introduce the rest of my proof, so that I can perfect the record. I desire to introduce a release from M. (plaintiff) and an assignment. I desire that they be placed in the record." Whereupon the court stated: "You can give it to the stenographer." By defendant's counsel: "Save my exceptions." Held, that the record did not show that defendant offered evidence other than the release and assignment, which was arbitrarily excluded when offered, but merely showed that defendant's offer was to introduce the release and assignment.

(For other cases, see Appeal and Error, Cent. Dig. §§ 2897-2899, 2902-2904, 2906, 2908; Dec. Dig. § 690.)

3. APPEAL AND ERROR—RECORD—CONSTRUCTION.

It is the duty of the Supreme Court to construe the record in so far as possible to support the trial court's ruling.

(For other cases, see Appeal and Error, Cent. Dig. § 3671; Dec. Dig. § 903.)

4. RELEASE—LIFE INSURANCE—ACTIONS—DEFENSES.

It was error to render judgment for plaintiff in an action on life policy upon the introduction in evidence of a valid release of the cause of action executed by her.

(For other cases, see Release, Cent. Dig. §§ 49, 50; Dec. Dig. § 38.)

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Action by Alice Mooney against the American National Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Horace Chamberlin and Wallace Townsend, both of Little Rock, for Appellant.

Miles & Wade, of Little Rock, for Appellee.



ROBERTSON vs. DISTRICT GRAND LODGE NO. 23.*

(Court of Appeals of Alabama.)

1. INSURANCE — ADJUSTMENT OF LOSS — RELEASE FROM LIABILITY.

Where a fraternal benefit society by reason of litigation between different factions had not sufficient funds to meet its obligations, an agreement between it and the beneficiary under a certificate, whereby the certificate was surrendered and canceled, the society was released and discharged of liability thereon, a partial payment was made, and the time of paying the balance due was extended, was not without consideration.

(For other cases, see Insurance, Cent. Dig. § 1966; Dec. Dig. § 792.)

2. INSURANCE—PAYMENT—RELEASE OR DISCHARGE FROM LIABILITY.

Under Code 1907, § 3973, providing that all discharges in writing of a debt

* Decision rendered, Feb. 12, 1914. 64 South. Rep. 647.

of record must have effect according to the intent of the parties, and section 3974, providing that all settlements in good faith for the composition of debts must be taken as evidence and held to operate according to the intention of the parties, though no release under seal is given, and no new consideration has passed, in an action on a benefit insurance certificate, a new contract by which the certificate was discharged and satisfied was admissible in evidence though there was no new consideration; it then being a question for the court or jury as to its sufficiency to bar the action.

(*For other cases, see Insurance, Cent. Dig. §§ 2003-2005; Dec. Dig. § 818.*)

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by H. K. Robertson, as administrator, against District Grand Lodge No. 23. Demurrers to certain pleas were overruled, whereupon plaintiff took a nonsuit and appeals. Affirmed.

Jere C. King, of Birmingham, for Appellant.
C. B. Powell, of Birmingham, for Appellee.

NATIONAL LIFE ASS'N OF DES MOINES vs. SPEER.*

(Supreme Court of Arkansas.)

1. TRIAL—WAIVER OF DEFENSES—EFFECT.

In an action on a life policy, where the defendant in open court waived all defenses pleaded by its answer except the defense of the delivery of the policy, the terms of which required its delivery to the insured while in good health, it must be assumed that, at the time the policy was mailed by the insurer to its agent, the insured was in good health.

(*For other cases, see Trial, Cent. Dig. § 90; Dec. Dig. § 37.*)

2. INSURANCE—DELIVERY OF POLICY.

An agreement for insurance provided that the insurer should incur no liability until the policy had been issued and delivered to the insured while in good health. The policy was mailed by the insurer to the agent, who took the application, but the insured declined to receive it, stating that he wished the application to go through the hands of another agent. Held that, as the agent who received the policy was the agent of the insurer for the purpose of ascertaining the fact whether the insured was in good health, and as the policy was not delivered to the insured but was returned to the insurer to be reissued on the account of a second agent, there was no delivery in accordance with the terms of the policy.

(*For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.*)

Appeal from Circuit Court, Green County; W. J. Driver, Judge.

Des Moines. From a judgment for plaintiff, defendant appeals. Reversed, cause dismissed.

Decision rendered, Jan. 26, 1914. 163 S. W. Rep. 1188.

R. P. Taylor, of Paragould, and Bartley & Douglass, of St. Louis, Mo.,
for Appellant.
Block & Kirsch, of Paragould, for Appellee.

BARNETT ET AL. vs. UNITED BROTHERS OF FRIENDSHIP.*

(Court of Appeals of Alabama.)

1. INSURANCE—INSURABLE INTEREST.

The public policy which forbids one having no insurable interest to take out insurance on the life of another does not prevent one who procures insurance on his own life from making the benefit payable to another who has no insurable interest in it.

(For other cases, see Insurance, Cent. Dig. §§ 1929-1931; Dec. Dig. § 767.)

2. INSURANCE—MUTUAL BENEFIT INSURANCE—BENEFICIARIES.

Unless restrained by statute, or by its charter or by-laws, an assessment insurance company can bind itself to pay the amount of the policy to beneficiaries named therein, though they have no insurable interest in the life of the insured member.

(For other cases, see Insurance, Cent. Dig. §§ 1929-1931; Dec. Dig. § 767.)

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.
Action by Nora Barnett and others against the United Brothers of Friendship. From a judgment for defendant, plaintiffs appeal. Affirmed.

Ferdue & Cox, of Birmingham, for Appellants.
H. H. Goldstein, of Birmingham, for Appellee.

* Decision rendered, Dec. 18, 1913. 64 South. Rep. 518.

MUTUAL LIFE INS. CO. OF NEW YORK vs. OWEN.*

(Supreme Court of Arkansas.)

1. WITNESSES—PHYSICIANS—DISQUALIFICATION.

Kirby's Dig. § 3098, provides that no person authorized to practice medicine or surgery shall be compelled to disclose any information which he may have acquired from his patient while attending him in a professional capacity, and which was necessary to enable him to prescribe as a physician, or to act for him as a surgeon or trained nurse. Held, that where insured's attending physician requested another physician to

* Decision rendered, Feb. 23, 1914. 164 S. W. Rep. 720.

accompany him on a visit to insured in order that the attending physician might have the benefit of the other's opinion with reference to insured's condition, and both examined insured and consulted concerning his ailment, both were disqualified to testify.

(For other cases, see Witnesses, Cent. Dig. §§ 768-770, 777; Dec. Dig. § 208.)

2. INSURANCE — MEDICAL HISTORY — REPRESENTATIONS — MATERIALITY.

An alleged false representation that the insured had not consulted a physician within five years, except one specified, was not a defense to the policy, where it was not shown that the ailment for which he consulted another physician in the meantime was of such a serious nature as to materially affect his health or longevity.

(For other cases, see Insurance, Cent. Dig. §§ 691, 692; Dec. Dig. § 292.)

3. INSURANCE—LIFE POLICY—REPRESENTATIONS—HEALTH.

Where a life policy provided that all statements made by insured, in the absence of fraud, were deemed representations and not warranties, and that no statements of insured should avoid or be used in defense to a claim under the policy, unless contained in the written application and in an action on the policy it did not appear by undisputed evidence that insured was suffering from heart disease when he made the application and was informed of the fact, whether insured willfully stated to the medical examiner that he was in good health and sound physically, and had not been subject to heart disease, was for the jury.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

4. INSURANCE — FALSE REPRESENTATIONS — BURDEN OF PROOF.

Where in an action on an insurance policy defendant pleaded fraudulent representations in defense, the burden of proving the fraud was on it.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.)

5. WITNESSES—FAMILY, FRIENDS AND ACQUAINTANCES.

Where an alleged illness of insured at the time he applied for and was granted insurance cannot be proved by his attending physicians, the fact may be shown by his family, friends, and acquaintances.

(For other cases, see Witnesses, Cent. Dig. §§ 77, 78; Dec. Dig. § 35.)

6. APPEAL AND ERROR—REVIEW—RULINGS ON EVIDENCE—PREJUDICE.

The admission of a letter in evidence was not prejudicial to defendant, where the statements contained therein to which objection was made were otherwise proved.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.)

7. INSURANCE—ACTION ON POLICY—ATTORNEY'S FEES.

In an action on a life policy for \$10,000, plaintiff having recovered, was only entitled to one reasonable fee for a competent attorney or firm of attorneys, as provided by Acts 1905, p. 307, and that an allowance of \$2,000 should be reduced to \$1,000.

(For other cases, see Insurance, Cent. Dig. §§ 1805, 1806; Dec. Dig. § 675.)

Judgment Appeal from Circuit Court, Faulkner County; Eugene Lankford,
sc.

Action by C. E. Owen as administrator of Owen J. Owen, deceased, against the Mutual Life Insurance Company of New York. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Frederick L. Allen, of New York City, Rose, Hemingway, Cantrell & Loughborough, of Little Rock, and J. C. Clark, of Conway, for Appellant.
Sam'l Frauenthal, of Little Rock, and R. W. Robins, of Conway, for Appellee.

MUTUAL LIFE INS. CO. vs. JORDAN.*

(Supreme Court of Arkansas.)

INSURANCE—CONTRACT—APPLICATION OR OFFER AND ACCEPTANCE.

An applicant sent in his application for a life policy through a local agent, and, after it had been forwarded by the agent to the home office, paid the agent the premium and wanted the policy modified so as to take effect from the date of such payment, and the agent wrote to the company to have this change made, but, before the modification had been accepted by the company or the policy delivered, the applicant died. Held, that there was no completed contract since the minds of the parties had never met.

(For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.)

Appeal from Circuit Court, Nevada County; Jacob M. Carter, Judge. Action by Lizzie D. Jordan against the Mutual Life Insurance Company. From judgment for plaintiff, defendant appeals. Reversed, and cause dismissed.

Frederick L. Allen, of New York City, Rose, Hemingway, Cantrell & Loughborough, of Little Rock, and McRae & Tompkins, of Prescott, for Appellant.

C. C. Hamby, of Prescott, for Appellee.

* Decision rendered, Feb. 9, 1914. 163 S. W. Rep. 799.

MODERN WOODMEN OF AMERICA vs. LOVELAND (No. 8,190.)*

(Appellate Court of Indiana, Division No. 1.)

1. APPEAL AND ERROR—BRIEF—SUFFICIENCY—EVIDENCE CONSIDERED BELOW.

Where, on appeal by defendant in a suit on a benefit certificate, its brief did not show that any part of its numerous by-laws were considered as

* Decision rendered, March 10, 1914. 104 N. W. Rep. 518.

evidence, except the fact that all the by-laws were attached to an agreed statement of facts on which the case was tried, apparently to enable the parties to select the parts to be used, the court cannot determine what part was considered by the lower court in reaching its conclusion.

(For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.)

2. APPEAL AND ERROR — BRIEFS — STATEMENT OF EVIDENCE.

Where parties in a case tried by the court stipulate to point out particular parts of by-laws to be considered as evidence, briefs on appeal should show the particular sections considered.

(For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.)

3. APPEAL AND ERROR—BRIEFS—STATEMENT OF EVIDENCE.

Where the record on appeal shows a case tried by the court on an agreed statement of facts, to which was attached certain instruments and numerous by-laws to be used as evidence, and appellant's briefs only set out certain sections of the by-laws and the substance of others, without indicating that these and no others were considered below, the statement of the evidence in the record is not sufficient to enable the court to determine the facts on which the case was decided.

(For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.)

4. APPEAL AND ERROR—REVIEW—PRESUMPTIONS.

Where the court is unable to determine from appellant's briefs the facts on which the court below reached its conclusions, it will be presumed that the case was rightly decided.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.)

Appeal from Circuit Court, Allen County; E. O'Rourke, Judge.

Action by Ellen Loveland against the Modern Woodmen of America. From a judgment for plaintiff, defendant appeals. Affirmed.

MUNROE ET AL. VS. BEGGS ET AL.*

(Supreme Court of Kansas.)

INSURANCE — TRUSTS — RECOVERY OF TRUST FUND — PARTIES.

In the certificate of a member of a fraternal insurance association his wife was named as beneficiary. They were subsequently divorced, and under the laws of the association she was no longer qualified to be a beneficiary, or to share in the benefit provided for in the certificate, and in the absence of the designation of a new beneficiary, the children of the member would have become entitled to the insurance upon his death. Before he died he designated his sisters as his beneficiaries, and shortly after his death they brought an action upon the certificate of insurance against the association, and recovered a judgment which

* Decision rendered, March 7, 1914. 139 Pac. Rep. 422. Syllabus by the Court.

was paid by the association. Later the children brought an action against the sisters so designated as beneficiaries, to recover the fund paid to them by the association, alleging that at the time the new beneficiaries were designated the insured was weakened of body and mind and that his sisters, through fraudulent representations, had induced him to name them as beneficiaries so as to assure the payment of the money to the children, two of whom were minors, and that they procured themselves to be named, not for the purpose of protecting the fund for the children, but that they might obtain and appropriate it to their own use. *Held:* First, that the fraternal association was not a necessary party to the action for the recovery of the fund; second, that the petition, which recited substantially the foregoing facts, stated a cause of action against the sisters of the insured; and, third, that the limitation in the certificate that no action could be maintained on the certificate unless it was brought within one year after the death of the member has no application to the action brought by the children to recover the fund from the sisters of the deceased member, who had gained possession of it through fraud.

(For other cases, see Insurance, Cent. Dig. §§ 1973, 1993; Dec. Dig. 795, 812; Trusts, Cent. Dig. §§ 574-583; Dec. Dig. § 366.)

Appeal from District Court, Labette County.

Action by Hazel M. Munroe and others against Lizzie M. Beggs and others. From judgment for defendants, plaintiffs appeal. Reversed and remanded.

W. B. Glassee and E. L. Burton, both of Parsons, for Appellants.
W. D. Atkinson, of Parsons, for Appellees.



CABELL *vs.* MUTUAL BEN. LIFE INS. CO.*

(Court of Appeals of Kentucky.)

INSURANCE—POLICIES—CONSTRUCTION.

Where a life policy, providing that it should not be forfeited for non-payment of premiums, but that the reserve value of the policy less the amount of any loans should be expended in purchasing extended insurance, and the policy contained a table showing how long the extension would continue in case of lapse at a given year, the personal representative of the insured cannot claim that, as the policy did not state whether the extended insurance should be purchased as of the age of the insured at the time of the lapse or at the time of the issuance of the policy, the ambiguity should be resolved against the insurance company, for, as the policy stated the length of time for which the paid-up insurance would be given, it was conclusive on that point.

(For other cases, see Insurance, Cent. Dig. §§ 935, 938; Dec. Dig. § 362.)

Appeal from Circuit Court, Warren County.

Action by Ellen D. Cabell, as administratrix, against the Mutual Benefit Life Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

* Decision rendered, March 6, 1914. 163 S. W. Rep. 1119.

George H. Galloway and Wright & McElroy, all of Bowling Green, for Appellant.

Richards & Harris, of Louisville, Sims & Rodes, of Bowling Green, and David Kay, Jr., of Newark, N. J., for Appellee.



RESERVE LOAN LIFE INS. CO. *vs.* BOREING.*

(Court of Appeals of Kentucky.)

1. INSURANCE — LIFE INSURANCE — ACTION — BURDEN OF PROOF—MISREPRESENTATIONS.

Where the insurance company admitted the acceptance of an application for a life policy, payment of the premium, and the issuance and delivery of the policy, and the applicant's death while it was in force, the burden is on it to establish a defense of false representations as to material matters in an action on the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.)

2. TRIAL—REBUTTAL EVIDENCE.

Rebuttal evidence is not necessarily confined to proving or disproving facts testified to by witness for the adverse party, but may be such as tends to overcome the legal effect of the evidence for the other side.

(For other cases, see Trial, Cent. Dig. §§ 148-150; Dec. Dig. § 62.)

3. TRIAL—REBUTTAL EVIDENCE.

Where in an action on a life policy, the company defended on the ground that the answers in the application as to insured's habits in drinking intoxicants were false and material, which plaintiff denied, and further alleged that they were not made by insured, and that the company had knowledge of his habits, evidence by defendant was competent as "rebuttal evidence" that insured went over the application and pronounced it all right, and also inspected the policy and stated that it was satisfactory; plaintiff having offered evidence to show that the answers were not made by insured.

(For other cases, see Trial, Cent. Dig. §§ 148-150; Dec. Dig. § 62.)

4. APPEAL AND ERROR—HARMLESS ERROR.

Where, in an action on a life policy, defended on the ground of false representations by insured as to his habit in drinking intoxicants, it was admitted that the local physician had knowledge of insured's drinking habits, and it appeared that the company's medical director had obtained a confidential report before the policy was issued that insured got intoxicated from four to six times a year for about two days at a time, error in excluding evidence that after the application was written up insured read it over and pronounced it all right, and also examined and approved the policy, was not prejudicial to the company.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.)

* Decision rendered, March 5, 1914. 163 S. W. Rep. 1085.

5. INSURANCE — LIFE INSURANCE — MISREPRESENTATIONS BY INSURED—ESTOPPEL.

Where a life insurance company, before issuing the policy, obtained a confidential report that insured got intoxicated from four to six times a year, and afterwards issued the policy and accepted the premium, it is estopped to rely on the falsity of answers in the application that insured did not use intoxicants to excess.

(For other cases, see *Insurance*, Cent. Dig. §§ 942, 966, 967, 975-997; Dec. Dig. § 377.)

Appeal from Circuit Court, Laurel County.

Action by Julia N. Boreing against the Reserve Loan Life Insurance Company. From judgment for plaintiff, defendant appeals. Affirmed.

Geo. G. Brock, of London, Guilford A. Deitch, of Indianapolis, Ind., and Grubbs & Grubbs, of Louisville, for Appellant.
Williams & Johnson, of London, for Appellee.

**CITIZENS' NAT. LIFE INS. CO. vs. RUTHERFORD.***

(Court of Appeals of Kentucky.)

INSURANCE — LIFE POLICY — CONSTRUCTION — INDEBTEDNESS.

Where a policy insured the life of plaintiff's husband in a specified sum subject to indebtedness of insured or beneficiary, the indebtedness that the insurer was entitled to deduct was not limited to unpaid premiums or loans obtained from the company on and secured by an assignment of the policy, but included any indebtedness of the insured or beneficiary of the insurer, however incurred.

(For other cases, see *Insurance*, Cent. Dig. §§ 1307, 1308; Dec. Dig. § 523.)

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

Action by Louise S. Rutherford against the Citizens' National Life Insurance Company. Judgment for plaintiff and defendant appeals. Reversed.

Helm Bruce and Bruce & Bullitt, all of Louisville, for Appellant.
Burnett, Batson & Cary, of Louisville, for Appellee.

* Decision rendered, March 12, 1914. 164 S. W. Rep. 107.

DOUGHERTY vs. SUPREME COURT OF INDEPENDENT ORDER OF FORESTERS.*

(Supreme Court of Minnesota.)

1. INSURANCE — BENEFIT SOCIETY — PAYMENT OF DUES — WAIVER OF REQUIREMENTS.

If a benefit society, by a course of conduct in accepting payment of dues and assessments after the time required by its laws, creates a belief on the part of the member that strict compliance with the letter of the contract as to time of payment will not be exacted, and the member in consequence fails to pay on the day appointed, the society will be held to have waived the requirement, and it will be estopped from setting it up as a cause of forfeiture.

(For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.)

2. INSURANCE—BENEFIT SOCIETY—PROMPT PAYMENT OF DUES—WAIVER—SUBORDINATE BODY.

When, by the laws of such a society, a subordinate body is the sole agency by which the society transacts the business for which it was organized, if the conduct of the subordinate body is such as to operate as a waiver of timely payment, such waiver is binding upon the superior body of the order itself, even though the superior body has no knowledge of the course of conduct of the subordinate body on which the waiver is based.

(For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.)

3. INSURANCE—BENEFIT SOCIETY—PAYMENT OF DUES—WAIVER—EXPULSION.

Where prompt payment has been waived, the member cannot be expelled without some notice that further indulgence will cease, and that no further delays will be granted, and that hence it is incumbent on him to pay in strict accordance with the laws of the order.

(For other cases, see Insurance, Cent. Dig. §§ 1834, 1835; Dec. Dig. § 694.)

Appeal from District Court, Ramsey County; Hascall R. Brill, Judge.

Action by Mary Dougherty against the Supreme Court of the Independent Order of Foresters. Verdict for plaintiff, and, from an adverse order, defendant appeals. Affirmed.

Kennedy & Kennedy and Thomas J. McDermott, all of St. Paul, for Appellant.

Doherty & McNally, of St. Paul, for Respondent.

* Decision rendered, March 6, 1914. 145 N. W. Rep. 813. Syllabus by the Court.

PIERSON vs. MODERN WOODMEN OF AMERICA.*

(Supreme Court of Minnesota.)

1. EVIDENCE — DOCUMENTS — BY-LAWS — AUTHENTICATION—EXCLUSION OF EVIDENCE.

In an action by the beneficiary named in a membership certificate issued by a fraternal insurance company to recover the amount payable upon the death of the member, the court rightly excluded a purported by-law pleaded in abatement, because the printed copy offered in evidence was not properly authenticated, and also because there was no offer to prove that the by-law was in force at a time when it could be material to the issues involved.

(For other cases, see Evidence, Cent. Dig. §§ 1538, 1559, 1560, 1562-1571; Dec. Dig. § 370.)

2. INSURANCE—ACTION ON BENEFIT CERTIFICATE—PROOF OF DEATH—SUFFICIENCY.

The evidence of the disappearance of the insured, of his continued absence for more than seven years, and of the inquiry and search for him were such that it sustains the finding of the jury that he was dead.

(For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. 819.)

3. TRIAL—REFUSAL OF INSTRUCTIONS COVERED.

No error was made in refusing to give certain instructions requested by defendant, for, in so far as such instructions embodied sound rules of law applicable to the issues litigated, they were fully covered by the general charge.

(For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.)

Appeal from District Court, Ramsey County; Hascall R. Brill, Judge. Action by Hattie E. Pierson against the Modern Woodmen of America. Verdict for plaintiff, and from denial of new trial, defendant appeals. Affirmed.

Benjamin D. Smith, of Mankato, and Percy D. Godfrey, of St. Paul, for Appellant.

Durment, Moore & Oppenheimer, of St. Paul, for Respondent.

* Decision rendered, March 6, 1914. 145 N. W. Rep. 806. Syllabus of the Court.

TRIPP VS. JORDAN ET AL.*
(Kansas City Court of Appeals. Missouri.)

1. INSURANCE—ASSIGNMENT OF POLICY.

An assignment of a life policy to one having no insurable interest in the life assured is void as within the rule against wagering policies.
(For other cases, see Insurance, Cent. Dig. §§ 166, 167; Dec. Dig. § 122.)

2. INSURANCE—ASSIGNMENT OF POLICY.

A life policy may be lawfully assigned as security for an indebtedness of the assured, though the creditor has no insurable interest in his life.
(For other cases, see Insurance, Cent. Dig. §§ 166, 167; Dec. Dig. § 122.)

3. INSURANCE —ASSIGNMENT OF POLICY.

Where one having a paid-up life policy was induced to make an assignment thereof by the fraud of the assignee, who had no insurable interest, by whom it was assigned to an innocent party for value, the second assignment was subject to the equities between the original assignor and his assignee.

(For other cases, see Insurance, Cent. Dig. § 486; Dec. Dig. § 216.)

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.
Action by David Tripp against Irvin Jordan and others. From a judgment awarding the proceeds of a life policy to the defendant Bain, plaintiff appeals. Reversed and remanded.

T. A. Witten, of Kansas City, for Appellant.
Hadley, Cooper, Neel & Wilson, of Kansas City, for Respondents Bain and Chesney.

* Decision rendered, Feb. 16, 1914. Rehearing denied, Feb. 28, 1914. 164 S. W. Rep. 158.



HATCHER VS. NATIONAL ANNUITY ASS'N OF KANSAS CITY.*

(Kansas City Court of Appeals. Missouri.)

INSURANCE—BENEFIT INSURANCE—AMOUNT OF DEATH BENEFIT.

The laws and practices of a benefit society in ascertaining the amount of death benefits, prevailing during the membership of a decedent, and which were an integral part of its contract with him, should be followed in computing the amount due, notwithstanding an existing by-law apportioned a less amount of assessments to the mortuary fund.
(For other cases, see Insurance, Cent. Dig. §§ 1961, 1962; Dec. Dig. § 791.)

* Decision rendered, Feb. 2, 1914. Rehearing denied, Feb. 28, 1914. 164 S. W. Rep. 188.

Error to Circuit Court, Livingston County; Arch B. Davis, Judge.
 Action by Lucy A. Hatcher against the National Annuity Association of Kansas City to recover on a benefit certificate. A judgment for plaintiff was reversed, and defendant moved to set aside the judgment thereupon rendered below for plaintiff on the mandate of the court of appeals. The motion was overruled, and defendant brings error. Affirmed.

F. S. Hudson and D. C. Finley, both of Chillicothe, for Plaintiff in Error.

Scott J. Miller, of Chillicothe, for Defendant in Error.



**KRECEK vs. SUPREME LODGE OF FRATERNAL UNION
OF AMERICA. (No. 18,158.)***

(Supreme Court of Nebraska.)

**1. APPEAL AND ERROR—TRIAL—MOTION FOR DIRECTED
VERDICT—FINDING.**

Where, at the close of the trial of a law action, each party moves for a directed verdict, the finding of the court takes the place of a verdict by the jury and will be so treated on appeal.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008; Trial, Cent. Dig. § 400; Dec. Dig. § 177.)

**2. INSURANCE—MUTUAL BENEFIT INSURANCE—SECRETARY
OF SUBORDINATE LODGE—NOTICE.**

The secretary of a subordinate lodge of a fraternal beneficiary association who receives the payment of dues from the members and forwards same to the company, is considered the agent of the company for that purpose, and the company will, ordinarily, be presumed to have knowledge of all facts known to such secretary in regard to the standing of members whose dues he so receives and forwards.

(For other cases, see Insurance, Cent. Dig. § 1836; Dec. Dig. § 695.)

**3. INSURANCE—MUTUAL BENEFIT INSURANCE—SECRETARY
OF SUBORDINATE LODGE—NOTICE.**

But when the applicant for membership conspires with the secretary and others of the subordinate lodge to deceive the company and to withhold from it knowledge of facts disqualifying the applicant for membership, the presumption of knowledge of such facts on the part of the company is overcome.

(For other cases, see Insurance, Cent. Dig. § 1836; Dec. Dig. § 695.)

**4. INSURANCE—MUTUAL BENEFIT INSURANCE—ELIGIBILITY
TO MEMBERSHIP—RATIFICATION OF FRAUD.**

Where the membership of a fraternal beneficiary association have determined as a mutual organization, and so declared in the constitution of the society, that persons engaged in a particular occupation shall be ineligible to membership, on any terms, the power to admit a person

* Decision rendered, Feb. 27, 1914. 145 N. W. Rep. 859. Syllabus by the Court.

engaged in such prohibited occupation to membership, or to ratify such membership when illegally gained, does not exist in either the supreme officers of the society or in any local lodge thereof.

(For other cases, see Insurance, Cent. Dig. § 1836; Dec. Dig. § 695.)

5. INSURANCE—MUTUAL BENEFIT INSURANCE—ELIGIBILITY TO MEMBERSHIP—RATIFICATION OF FRAUD—ESTOPPEL.

And in such a case the payment, by one so admitted, of dues and assessments to a local lodge of the society, cannot have the effect of validating his membership; nor will it estop the company from denying liability after his death, whether the officers of the local lodge, at the time of receiving such dues and assessments, had or had not knowledge of the fraud practiced by him in gaining and retaining such membership.

(For other cases, see Insurance, Cent. Dig. §§ 1836, 1837, 1866-1868; Dec. Dig. §§ 695, 724.)

Sedgwick and Letton, JJ., dissenting.

Appeal from District Court, Douglas County; Sears, Judge.

Action by Emma Krecek against the Supreme Lodge of Fraternal Union of America. From judgment for plaintiff, defendant appeals. Reversed and remanded.

H. H. Bowes and E. L. Bradley, both of Omaha, and Allen & Webster, of Denver, Colo., for Appellant.

A. H. Murdock, of Omaha, for Appellee.



CILEK vs. NEW YORK LIFE INS. CO. (No. 18,275.)* .

(Supreme Court of Nebraska.)

1. INSURANCE—POLICY—ENFORCEMENT.

An insurance contract, where there is no uncertainty as to its meaning, and the same is legal and not opposed to public policy, will be enforced as it is made.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

2. INSURANCE — POLICY — CONSTRUCTION — PREMIUMS — CREDIT OF PROFITS.

It was provided, by the terms of a twenty-year endowment life insurance Policy, that at the end of the twenty-year accumulation period, which was June 13, 1919, if the premiums have been duly paid to that date, and not otherwise, the company will apportion to the insured his share of accumulation profits. The assured, having paid seven annual premiums, and having borrowed from the company the full amount of the reserve accredited to the policy, defaulted in the payment of his annual premium, and, after the lapse of more than thirty days from the date of his default died. Held, that the beneficiary is not entitled to have indefinite and uncertain profits credited to such policy in order to keep it in force.

(For other cases, see Insurance, Cent. Dig. §§ 935, 938; Dec. Dig. § 367.)

* Decision rendered, Feb. 13, 1914. 145 N. W. Rep. 693. Syllabus by the Court.

3. INSURANCE CONTRACT—VALIDITY.

The insurance laws of the state of New York and the charter of the insurance company examined and found to contain nothing which is in conflict with the terms of the insurance contract as written.

4. INSURANCE — FORFEITURE — NOTICE — WHAT LAW GOVERNS.

The provisions of the insurance laws of the state of New York, requiring notice to be mailed to the policyholder in that state as a condition of forfeiture for nonpayment of premiums, has no application to insurance contracts made in this state.

(For other cases, see *Insurance*, Cent. Dig. § 894; Dec. Dig. § 351.)

5. INSURANCE—LOAN ON POLICY—ESTOPPEL OF BENEFICIARY.

In case the beneficiary has joined with the insured in the application for a loan upon the insurance policy, she cannot afterwards claim that the loan was made without her knowledge or authority.

(For other cases, see *Insurance*, Dec. Dig. § 179½.)

Appeal from District Court, Sheridan County; Westover, Judge.

Action by Lucy Belle Rye, now Lucy Belle Cilek, against the New York Life Insurance Company. From judgment for plaintiff, defendant appeals. Reversed and dismissed.

Switzler, Goss & Switzler, of Omaha, and A. W. Crites, of Chadron, for Appellant.

Fisher & Rooney, of Chadron, and A. M. Morrissey, of Lincoln (James H. McIntosh, of New York City, of counsel), for Appellee.



**PIRICS ET AL. vs. FIRST RUSSIAN SLAVONIC GREEK
CATHOLIC BENEVOLENT SOCIETY, UNDER THE
PROTECTORATE OF ARCHANGEL ST.
MICHAEL.***

(Court of Chancery of New Jersey.)

1. BENEFICIAL ASSOCIATIONS — CONSTITUTION AND BY-LAWS.

Where the constitution and by-laws of a benevolent society were promulgated contemporaneously in Russian and English, the fidelity of the English text could not be questioned after many years, during which the members had the right to rely on its accuracy.

(For other cases, see *Beneficial Associations*, Cent. Dig. §§ 5, 6; Dec. § 5.)

2. BENEFICIAL ASSOCIATIONS—EXPULSION OF MEMBERS.

Where, by the practical construction given the constitution and by-laws of a benevolent society, the words "Greek Catholic," in the provision naming those eligible for membership, had been for almost twenty years re-

* Decision rendered, March 11, 1914. 89 Atl. Rep. 1036.

garded as including members of the Russian communion, members of that communion who had been admitted could not thereafter be expelled on the ground that they were ineligible.
(For other cases, see Beneficial Associations, Cent. Dig. §§ 12-17, 20; Dec. Dig. § 10.)

3. BENEFICIAL ASSOCIATIONS — BY-LAWS — EXPULSION OF MEMBERS.

An amendment of the by-laws of a benevolent society excluding from membership therein members of the Russian communion did not authorize the expulsion of members of that communion who had been previously admitted, as it could not have a retroactive effect.

(For other cases, see Beneficial Associations, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.)

4. BENEFICIAL ASSOCIATIONS — NATURE AND STATUS — RIGHTS OF EXPELLED MEMBERS.

The contract of a society organized to provide sick benefits, pay funeral expenses, and help the widow or others left behind with members who pay an initiation fee and monthly dues, which are supplemented from other sources, is not an ordinary contract of insurance, and the rights of members unlawfully expelled are not to be decided as though it were an insurance proposition.

(For other cases, see Beneficial Associations, Cent. Dig. §§ 12-17, 20; Dec. Dig. § 10.)

5. INSURANCE—THE CONTRACT IN GENERAL—DEFINITION OF "CONTRACT OF INSURANCE."

An ordinary "contract of insurance" is defined as an agreement to pay a given sum on the happening of a particular event, contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum or a certain equivalent periodical payment.

(For other cases, see Insurance, Cent. Dig. §§ 172, 178; Dec. Dig. § 124.)

(For other definitions, see Words and Phrases, vol. 2, p. 1531.)

6. BENEFICIAL ASSOCIATIONS—PROPERTY AND FUNDS.

The property of a society organized to provide sick and death benefits is impressed with a trust for the uses of the society, but the trust is for all the members and none can be deprived of their interest therein, except as provided in the by-laws.

(For other cases, see Beneficial Associations, Cent. Dig. §§ 36-40; Dec. Dig. § 17.)

7. BENEFICIAL ASSOCIATIONS—RIGHTS OF EXPELLED MEMBERS—DISSOLUTION.

Where a benevolent society has unlawfully expelled all those of a certain class, and the remaining members, who are in the majority, desire to continue the society, equity will not exercise its power to dissolve it, but will decree a fair distribution of the property between the expelled members and those who remain.

(For other cases, see Beneficial Association, Cent. Dig. §§ 12-17, 20, 58, 59; Dec. Dig. §§ 10, 22.)

8. MANDAMUS—SUBJECTS AND PURPOSES OF RELIEF—ACTS AND PROCEEDINGS OF PRIVATE CORPORATIONS—REINSTATEMENT OF EXPELLED MEMBERS.

Mandamus is the appropriate remedy to compel reinstatement of members

of a corporation who have been wrongfully expelled, but not in the case of an unincorporated association.

(For other cases, see *Mandamus*, Cent. Dig. §§ 259, 260; Dec. Dig. § 125.)

9. BENEFICIAL ASSOCIATIONS—INJUNCTION.

Injunction will not issue to compel the reinstatement of a faction in a beneficial religious society who have been wrongfully expelled after much heat and violence, as to do so would not be consistent with equity.

(For other cases, see *Beneficial Associations*, Cent. Dig. § 21; Dec. Dig. § 12.)

10. REFERENCE—REPORT AND FINDINGS—CONFORMITY TO ORDER OF REFERENCE.

An agreed order of reference providing that the amount due should be determined, "regard being had" to four particulars, was not too narrow to admit of a disposition of the case wherein two of the particulars named were deemed unimportant; the real question being the sum due, and the subordinate matters not being controlling.

(For other cases, see *Reference*, Cent. Dig. §§ 49-53, 55; Dec. Dig. § 29.)

11. CORPORATIONS—CORPORATE EXISTENCE—EVIDENCE OF CORPORATE EXISTENCE.

A society alleged to have been incorporated soon after its organization could not be treated as a corporation, where no proof was made of the identity of the society and the alleged corporation, whose names differed, nor even of the certificate of incorporation.

(For other cases, see *Corporations*, Cent. Dig. §§ 106-118, 2086, 2087; Dec. Dig. § 32.)

Suit by George Pirics and others against the First Russian Slavonic Greek Catholic Benevolent Society, under the Protectorate of Archangel St. Michael. Master's report confirmed.

L. A. Sullivan and M. Dunn, both of Paterson, for Complainants.
Lefferts & Lefferts, of Passaic, and Joseph E. Stricker, of Perth Amboy, for Defendant.



PARKS *vs.* SUPREME CIRCLE, BROTHERHOOD OF AMERICA ET AL.*

(Court of Chancery of New Jersey.)

1. INSURANCE—MUTUAL BENEFIT INSURANCE.

The contract between a mutual benefit association and its members is contained in the fundamental laws of the association, and a power of amendment contained in the charter or by-laws in general terms only contemplates reasonable amendments adopted in furtherance of the contract, and not such as would materially alter its terms.

(For other cases, see *Insurance*, Cent. Dig. § 1855; Dec. Dig. § 719.)

* Decision rendered, March 18, 1914. 89 Atl. Rep. 1042.

2. INSURANCE—MUTUAL BENEFIT ASSOCIATION—AMENDMENT OF BY-LAWS.

When complainant joined a fraternal benefit society, the by-laws provided for a fund from which payments were made to each beneficiary, which fund was created by monthly payments of dues, 5 per cent of which were set apart for a reserve fund, and the balance held to meet current monthly death benefits. The reserve fund, like the monthly balance from dues, could only be used to pay death benefits. In 1912 the by-laws were amended by creating two divisions of the membership; division No. 1 including members admitted after March 1, 1910, when an amendment was adopted graduating dues according to the age, and members admitted prior to that time who elected to become members of that division, while division No. 2 included all members admitted before March 1, 1910, who declined to become members of division No. 1. The dues of division No. 1 were graduated, while the dues in division No. 2 remained the same as originally. By the amendments the funds were to be divided between the two divisions "in proportion to the duration of membership," the aggregate years of membership of all members in each division determining its percentage of the fund, and, after such division, each fund was exempted from liability for losses in the other division, and all new members were required to join division No. 1. Enforcement of the amendment was enjoined as against old members, and in 1913 another amendment was adopted providing that the reserve fund should be equitably divided by apportioning it among the whole membership in proportion to their life expectancies, and that the respective parts should remain a separate trust fund for the losses arising in the respective divisions, and the fund of one division should not be liable for losses arising in the other. *Held*, that the amendments of 1912 and 1913 violated the contract rights of a member who had joined before March 1, 1910, so that he could enjoin their enforcement.

(For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.)

Suit by Daniel H. Parks against the Supreme Circle, Brotherhood of America, on final hearing of bill. Injunction issued.

Oscar B. Redrow, of Camden, for Complainant.
John F. Harned, of Camden, for Defendant.



WILCOX vs. SUPREME COUNCIL OF ROYAL ARCANUM.*

(Court of Appeals of New York.)

1. INSURANCE—MUTUAL BENEFIT INSURANCE—EXPULSION OF MEMBERS—REVIEW.

The courts cannot review proceedings to expel a member of a benefit society conducted strictly in accordance with the laws of the order or re-examine the merit of the expulsion, but can only determine whether the member was tried according to the law of the land.

(For other cases, see Insurance, Cent. Dig. §§ 1834, 1835; Dec. Dig. § 694.)

* Decision rendered, Feb. 24, 1914. 104 N. E. Rep. 624.

2. INSURANCE—MUTUAL BENEFIT INSURANCE—EXPULSION OF MEMBERS—REVIEW.

The expulsion of a member from a benefit insurance society can be attacked for disqualification of the committee by which he was tried in an action on his benefit certificate; the rule against collateral attack not applying, since there is no method of direct review.

(For other cases, see Insurance, Cent. Dig. §§ 1834, 1835; Dec. Dig. § 694.)

3. INSURANCE—MUTUAL BENEFIT INSURANCE—DISQUALIFICATION OF JUDGES.

Under the laws of a benefit insurance society providing for the trial of charges against a member by a trial committee consisting of members of the order who should, "if practicable," be members of the Supreme or Grand Council, on the trial of a member for improper conduct violative of his duties and obligations and of conduct unbecoming his profession as a member in that he had, in violation of the laws of the order, published defamatory interviews attacking the Supreme Council and its officers and charging them with graft, fraud, and dishonesty, and had openly denounced the Supreme Council and charged its officers with being grafters, thieves, and robbers, where the truth of such charges was put in issue, members of the Supreme Council were disqualified, because of their direct interest in the subject-matter of the controversy from sitting in the trial committee, and, where they did so sit, the expulsion of the member was void.

(For other cases, see Insurance, Cent. Dig. §§ 1834, 1835; Dec. Dig. § 694.)

Appeal from Supreme Court, Appellate Division, Third Department. Action by Mary Clara Wilcox against the Supreme Council of the Royal Arcanum. An order setting aside a directed verdict for plaintiff was reversed by the Appellate Division, Third Department (151 App. Div. 297, 136 N. Y. Supp. 377), and defendant appeals. Affirmed.

Howard C. Wiggins, of Rome, for Appellant.

Stewart F. Hancock, of Syracuse, for Respondent.

**TILLERY vs. ROYAL BENEFIT SOCIETY ET AL.***

(Supreme Court of North Carolina.)

1. APPEAL AND ERROR — DISMISSAL — WANT OF JURISDICTION.

A motion to dismiss for want of jurisdiction because of the amount in controversy may be made for the first time in the Supreme Court.

(For other cases, see Appeal and Error, Cent. Dig. §§ 1166-1176, 1375; Dec. Dig. § 185.)

2. COURTS—JURISDICTION—SUPERIOR COURT.

The amount demanded in good faith, and not the amount recovered, determines jurisdiction, and hence the Superior Court has jurisdiction in

* Decision rendered, March 11, 1914. 80 S. E. Rep. 1068.

an action on an insurance policy in which the demand made in good faith was for \$202.

(For other cases, see Courts, Cent. Dig. §§ 413-426, 428, 450, 452, 458, 459, 466; Dec. Dig. § 121.)

3. TRIAL—INSTRUCTIONS—OPINION AS TO FACTS.

A requested charge that, if insured was more than fifty-five years of age when he applied for membership, the association was not liable on the policy, "as the same was procured under a misrepresentation of the age" of insured, would be properly refused as an expression of opinion upon the facts, even if there was any evidence to support it.

(For other cases, see Trial, Cent. Dig. §§ 436-438; Dec. Dig. § 193.)

4. TRIAL—INSTRUCTIONS—APPLICATION TO EVIDENCE.

A requested charge that, if insured was more than fifty-five years of age when he applied for membership, the association was not liable on the policy, "as the same was procured under a misrepresentation of the age" of insured, was properly refused, where there was no evidence that insured had made any representation as to his age.

(For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.)

Appeal from Superior Court, Carteret County; Whedbee, Judge.

Action by Bert Tillery against the Royal Benefit Society and another. From a judgment for plaintiff, defendants appeal. Affirmed.

C. R. Wheatley, of Beaufort, for Appellants.

E. H. Gorham, of Morehead City, for Appellee.



BRITTON *vs.* METROPOLITAN LIFE INS. CO. OF NEW YORK.*

(Supreme Court of North Carolina.)

1. EVIDENCE—PAROL EVIDENCE—INSURANCE—RECEIPT OF PREMIUM—ACKNOWLEDGMENT.

An acknowledgment in a life policy of the receipt of a semiannual premium is not a mere receipt but a part of the contract in so far as the insurer's right to forfeit the policy is concerned, and estops the insurer to claim a forfeiture because of a parol contract between the insured and the insurer's agent that the premium should be paid quarterly, pursuant to which agreement only a payment of quarterly premium at the beginning of the insurance term instead of a semiannual premium was made.

(For other cases, see Evidence, Cent. Dig. § 2148; Dec. Dig. § 469.)

2. INSURANCE—INSURANCE POLICY.

A policy of insurance may be reformed on proper allegations and proofs as any other contract.

(For other cases, see Insurance, Cent. Dig. §§ 265-272; Dec. Dig. § 143.)

* Decision rendered, March 11, 1914. 80 S. E. Rep. 1072.

3. REFORMATION OF INSTRUMENTS—GROUNDS—MISTAKE.

In order to sustain the suit for a reformation of a written contract, the complainant must show that the instrument sought to be corrected failed to express the real agreement or transaction because of a mistake common to both parties or because of a mistake of one party and the fraud and inequitable conduct of the other.

(For other cases, see *Reformation of Instruments*, Cent. Dig. § 68; Dec. Dig. § 16.)

4. REFORMATION OF INSTRUMENTS—GROUNDS—MISUNDERSTANDING OF FACTS.

A mere misunderstanding of facts is not a sufficient ground for reformation of a written contract.

(For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 69-71; Dec. Dig. § 17.)

5. INSURANCE—REFORMATION OF POLICY—MISTAKE.

Defendant having issued a policy on decedent's life providing for the payment of semiannual premiums, insured, by parol contract with defendant's agent, agreed that the premiums should be paid quarterly, and defendant accepted quarterly payments without change of the policy in accordance with its custom. *Held*, that such facts did not constitute a mistake for which the insurer was entitled to have the policy reformed.

(For other cases, see *Insurance*, Cent. Dig. §§ 265-272; Dec. Dig. § 143.)

Appeal from Superior Court, Halifax County; Peebles, Judge.

Action by W. P. Britton, as administrator of W. E. Albritton, against the Metropolitan Life Insurance Company of New York, on a policy of life insurance issued by defendant on the life of plaintiff's intestate. From a judgment for plaintiff, defendant appeals. *Affirmed*.

This is an action to recover on a policy of insurance, issued by the defendant upon the life of plaintiff's intestate by the defendant, and tried at August term, 1913, Superior Court of Halifax County, Peebles, Judge, presiding, upon this issue: "(1) Is the defendant indebted to the plaintiff, and, if so, in what amount?" Answer: \$1,000, with interest from March 1, 1911." From the judgment rendered, the defendant appealed.

Winston & Biggs, of Raleigh, for Appellant.

A. P. Kitchin, of Scotland Neck, and E. L. Travis, of Halifax, for Appellee.



MODERN WOODMEN OF AMERICA *vs.* GHROMLEY.*

(Supreme Court of Oklahoma.)

1. DEATH—PRESUMPTION—EVIDENCE OF ABSENCE.

G., whose age at the time is not shown, but who was a mere youth, left his home in Kentucky, going to Texas. At the time of his departure he left a brother, four years his junior, an inmate of an orphans' home. Upon reaching eighteen years of age, G. returned to his former home

* Decision rendered, Feb. 28, 1914. 139 Pac. Rep. 306. Syllabus by the Court.

in Kentucky, where he spent three days trying to get word of his brother, but failed. It is not shown that the brothers had ever corresponded with each other, or that the younger knew of the elder's whereabouts. The year previous to the brother's return, the yellow fever had visited the locality of the orphans' home, causing a number of deaths. It was not proven for what length of time the younger brother remained in the orphans' home or whether he was an inmate thereof on the visit of the pestilence nor did it appear of whom inquiry was made or the extent thereof. *Held*, the facts proved were insufficient to raise the presumption of death, arising from an absence from home, unheard from, for a period of seven years.

(For other cases, see Death, Cent. Dig. §§ 1-3; Dec. Dig. § 2.)

2. DEATH—PRESUMPTION—ESSENTIAL BASIS.

In order that the presumption that a person once shown to have been alive continues to live may be overcome by the presumption of death, arising from seven years' unexplained absence from home or place of residence, there must be a lack of information concerning the absentee on the part of those likely to hear from him, after diligent inquiry.

(For other cases, see Death, Cent. Dig. §§ 1-3; Dec. Dig. § 2.)

3. DEATH—PRESUMPTION—ESSENTIAL BASIS.

The inquiry should extend to all those places where information is likely to be obtained, and to all those persons who in the ordinary course of events would be likely to receive tidings if the party were alive, whether members of his family or not and, in general, the inquiry should exhaust all patent sources of information, and all others which the circumstances of the case suggest.

(For other cases, see Death, Cent. Dig. §§ 1-3; Dec. Dig. § 2.)

4. DEATH—PRESUMPTION—NATURE AND EXTENT.

The presumption of death is one that generally is applied only to those who were absentees from their home; but does not authorize such absent person or persons to presume, therefore, that any one of those remaining at the place which he or they have left has died.

(For other cases, see Death, Cent. Dig. §§ 1-3; Dec. Dig. § 2.)

5. DEATH—PRESUMPTION—NATURE AND EXTENT.

With even greater force should the rule last announced be confined in the case of those of tender years, such as the separation of two brothers during their boyhood days.

(For other cases, see Death, Cent. Dig. §§ 1-3; Dec. Dig. § 2.)

6. DESCENT AND DISTRIBUTION—PRESUMPTION OF HEIRSHIP.

It is a presumption of law that a person dying intestate has left heirs capable of succeeding to his estate.

(For other cases, see Descent and Distribution, Cent. Dig. §§ 229-236; Dec. Dig. § 71.)

Commissioners' Opinion, Division No. 1. Error from District Court, Bryan County; Summers Hardy, Judge.

Action by Margaret Ghromley, administratrix of the estate of Christopher F. Green, deceased, against the Modern Woodmen of America. Judgment for plaintiff, and defendant brings error. Reversed.

Truman Plantz, of Rock Island, Ill., Geo. L. Bowman, of Kingfisher, and Geo. G. Perrin, of Rock Island, Ill., for Plaintiff in Error.

Utterback, Hayes & MacDonald, of Durant, for Defendant in Error.

LITTLE ET AL. vs. GRAND LODGE K. P. OF SOUTH CAROLINA.*

(Supreme Court of South Carolina.)

INSURANCE—MUTUAL BENEFIT INSURANCE—WAIVER OF LAWS OF ORDER—QUESTION FOR JURY.

In an action on an insurance policy, a motion for nonsuit, on the ground that the insured, at his death, was living in concubinage in violation of the laws of the order, was properly refused where, after consideration of the claim at a meeting of the grand lodge, the beneficiary was declared to be the legal wife of the insured, and was directed to secure letters of administration, as it was for the jury whether the lodge waived a strict compliance by insured of the laws of the order.

(For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.)

Appeal from Common Pleas Circuit Court of Richland County; Ernest Gary, Judge.

"To be officially reported."

Action by Robert Little, administrator of the estate of W. A. Key, deceased, and another against the Grand Lodge Knights of Pythias of South Carolina, subordinate to the Supreme Lodge Knights of Pythias of North America, South America, Europe, Asia, Africa, and Australia. From a judgment for plaintiff, defendant appeals. Affirmed.

Shand, Benet, Shand & McGowan and Logan & Edmunds, all of Columbia, for Appellant.

Robt. Moorman, Hunter A. Gibbes, and W. Hampton Cobb, all of Columbia, for Respondent.

* Decision rendered, March 18, 1914. 81 S. E. Rep. 152.

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GREEN ET AL. vs. GRAND UNITED ORDER OF ODD FELLOWS ET AL.*

(Court of Civil Appeals of Texas. Austin.)

1. INSURANCE—MUTUAL BENEFIT INSURANCE—RIGHT TO DESIGNATE BENEFICIARY—"BENEFIT CERTIFICATE."

Acts 26th Leg. c. 115, § 1, defines a fraternal benefit association, and section 5, subds. 1, 23, 24, requires such associations to make an annual report, stating the number of certificates issued, thus recognizing the right of such associations to issue benefit certificates. Section 1 further provides that payment of death benefits shall be to the families, heirs, blood relatives, affianced husband or wife, or to persons dependent upon the member at the time of his death, and that, should there be no one of the classes mentioned capable of taking the benefit, it shall pass as provided by the laws of the association. Held that, as it must

* Decision rendered, May 24, 1911. 163 S. W. Rep. 1068.

be presumed that the Legislature used the expression "benefit certificate" as meaning a written obligation to pay the person therein named the amount specified upon the conditions therein stipulated, and knew that it was the duty of the courts to enforce such contracts unless restricted by statute, and that it had been their universal custom to pay the benefit to the person named therein if he belonged to any one of the classes named, the last-mentioned provision of such act merely names the classes from which the insured may select his beneficiary, and is not a law of descent and distribution, requiring the benefit to be paid to such classes of persons in the order in which they are named; and where a member designated his father and mother as beneficiaries, and the certificate was payable by its terms to them, they were entitled to the benefit, though the member left a wife and child constituting his "family."

(For other cases, see Insurance, Cent. Dig. §§ 1933, 1937; Dec. Dig. § 770.)

2. INSURANCE — MUTUAL BENEFIT INSURANCE — BENEFICIARY—CHANGE.

In the absence of any statutory provision to that effect, where the father and mother of a member of a benefit society were designated as beneficiaries, his subsequent marriage did not change the beneficiary.

(For other cases, see Insurance, Cent. Dig. § 1940; Dec. Dig. § 774.)

Appeal from Fayette County Court; George Willrich, Judge.

Bill of interpleader by the Grand United Order of Odd Fellows against Tom Green and others. From a judgment in favor of defendant Clara Green, defendants Tom Green and another appeal. Reversed and rendered. Certified questions answered by Supreme Court (163 S. W. 1071).

H. S. Morehead, of Franklin, for Appellants.

John T. Duncan, of La Grange, for Appellee Clara Green.



**GREEN ET AL. VS. GRAND UNITED ORDER OF ODD
FELLOWS ET AL.***

(Supreme Court of Texas.)

INSURANCE—MUTUAL BENEFIT INSURANCE—RIGHT TO DESIGNATE BENEFICIARY.

Acts 26th Leg. c. 115, § 1, providing that payment of death benefits by fraternal beneficiary associations shall be to the families, heirs, blood relatives, affianced husband or wife, or to persons dependent on the member at the time of his death, and that, should there be no one of such classes capable of taking the benefit, it shall pass as provided by the laws and rules of the association, does not deny to the member the right to designate a beneficiary within the classes mentioned, especially in view of section 11, which provides that the benefits to be paid or provided shall not be liable for the debts of the beneficiary or holder of any certificate, and shall not be subject to garnishment or other process nor taken, seized, appropriated, or applied by any legal or equitable

* Decision rendered, Feb. 11, 1914. 163 S. W. Rep. 1071.

process, or by operation of law, to the debts of the certificate holder, or "any beneficiary named in such certificate," or any person having any rights thereunder.

(For other cases, see Insurance, Cent. Dig. §§ 1933, 1937; Dec. Dig. § 770.)

Certified Questions from Court of Civil Appeals of Third Supreme Judicial District.

Bill of interpleader by the Grand United Order of Odd Fellows against Tom Green and others. From a judgment in favor of defendant Clara Green, defendants Tom Green and another appealed to the Court of Civil Appeals, Third District, which certified certain questions to this court. Questions answered.

For opinion below, see 163 S. W. 1068.

H. S. Morehead, of Franklin, for Appellants.
John T. Duncan, of La Grange, for Appellees



HUGHES *vs.* FOUR STATES LIFE INS. CO.*

(Court of Civil Appeals of Texas. Texarkana.)

1. APPEAL AND ERROR—REVIEW—RECEPTION OF EVIDENCE —PREJUDICE.

Where, in an action on notes given for certain of plaintiff's corporate stock, plaintiff's managing agent testified that B., who sold the stock to defendant, was plaintiff's authorized agent to sell the same, and plaintiff was seeking to recover on notes taken by B. in payment for stock, the fact that the court permitted B. to testify that he had authority to sell the stock, and take notes or cash in payment thereof, under an objection that his written contract of agency was the best evidence, was not reversible error.

(For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.)

2. INSURANCE — FOREIGN CORPORATIONS — "DOING BUSINESS" IN STATE—SALE OF STOCK.

Sale, in Texas, of stock of a foreign insurance company, and taking notes for the price, does not constitute transacting or doing business in Texas, within the statutes regulating the transaction of business by foreign corporations in Texas.

(For other cases, see Insurance, Cent. Dig. § 17; Dec. Dig. § 16.)

(For other definitions, see Words and Phrases, vol. 3, pp. 2155-2160; vol 8, pp. 7640, 7641.)

3. INSURANCE—AGENTS—REGULATION—SALE OF STOCK.

Rev. St. 1911, arts. 4960, 4961, making it unlawful for any person to act as agent for an insurance company in soliciting or receiving applications, etc., without having procured a certificate of authority from the com-

* Decision rendered, Feb. 9, 1914. Rehearing denied, Feb. 19, 1914. 164 S. W. Rep. 898.

missioner of banking and insurance, has no application to an agent of a foreign insurance company selling its stock in Texas.

(For other cases, see Insurance, Cent. Dig. § 26; Dec. Dig. § 22.)

4. BILLS AND NOTES — PEREMPTORY INSTRUCTION — QUESTIONS OF FACT.

Where, in an action on notes given for the price of stock of a foreign insurance company defendant expressly admitted that he gave the notes sued on for the purchase of the stock, and there was no issue of fact presented for a jury, the court properly directed a verdict for plaintiff.

(For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1893; Dec. Dig. § 537.)

5. PLEADING—AMENDMENT—EFFECT.

Where, in an action on notes given for stock in plaintiff insurance company, plaintiff filed a supplemental petition before defendant's amended original answer, and replied to certain allegations in the original answer concerning the written contract, after which defendant filed an amended original answer which contained nothing but a general denial, and made no averments in reference to or applicable to the note sued on in the petition on which the case was tried, averments of the original answer and supplemental petition concerning the contract of subscription passed out of the record, so that pleadings presented no issue on such question.

(For other cases, see Pleading, Cent. Dig. §§ 803-805; Dec. Dig. § 264.)

Appeal from Franklin County Court; J. J. Walker, Judge.

Action by the Four States Life Insurance Company against W. W. Hughes. Judgment for plaintiff, and defendant appeals. Affirmed.

G. E. Cowan and H. W. Hunt, both of Mt. Vernon, for Appellant.
Wilkinson & Wilkinson, of Mt. Vernon, for Appellee.



SOVEREIGN CAMP WOODMEN OF THE WORLD.

*vs. BAILEY.**

(Court of Civil Appeals of Texas. San Antonio.)

1. EVIDENCE—RES GESTÆ.

In a suit on a benefit certificate issued by a fraternal beneficiary association, the by-laws of which provided that the certificate should be void if the insured should die in consequence of a violation of any law, it appeared that insured was killed while engaged in a brawl. *Held*, that evidence of declarations made immediately after the killing by one of the men who was present that the killing was in self-defense was admissible as part of the res gestæ.

(For other cases, see Evidence, Cent. Dig. §§ 351-368; Dec. Dig. § 123.)

* Decision rendered, Feb. 4, 1914. Rehearing denied, Feb. 25, 1914.
163 S. W. Rep. 683.

**2. INSURANCE — MUTUAL BENEFIT INSURANCE — ACTIONS
—JURY QUESTION.**

In an action against a mutual benefit insurance association, evidence on the question whether insured met his death while in violation of law held sufficient to go to the jury.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

3. WITNESSES—PRIVILEGE OF WITNESS.

In general, a witness may decline to answer any question which tends either directly to criminate him, or which may indirectly produce such result.

(For other cases, see Witnesses, Cent. Dig. § 1008; Dec. Dig. § 292.)

4. WITNESSES—PRIVILEGE—INCRIMINATION.

Under Const. U. S. Amend. 5, providing that no person shall be compelled in any criminal case to be a witness against himself and under the State Const. art. 1, § 10, providing that, in all criminal prosecutions, the accused shall not be compelled to give evidence against himself, a witness in a civil suit desiring to be relieved from answering a question, on the ground that it will tend to incriminate him, cannot sit silently by and refuse to answer without giving a reason for his silence, but must swear that he believes his answer would incriminate him, it being for the court to determine the question of privilege.

(For other cases, see Witnesses, Cent. Dig. §§ 1061-1064; Dec. Dig. § 307.)

5. WITNESSES—PRIVILEGE—INCRIMINATORY STATEMENT.

The privilege of refusing to answer questions on the ground that it would tend to incriminate the witness cannot be put forward for the purpose of concealing facts in the interest of some third person.

(For other cases, see Witnesses, Cent. Dig. § 1008; Dec. Dig. § 292.)

Appeal from District Court, Victoria County; John M. Green, Judge.
Action by O. F. Bailey against the Sovereign Camp of Woodmen of the World. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

A. H. Burnett, of Omaha, Neb., and E. D. Henry, R. L. Daniel, and Augustus McCloskey, all of San Antonio, for Appellant.

Proctor, Vandenberge & Crain, of Victoria, for Appellee.



FIRST TEXAS STATE INS. CO. *vs.* JIMINEZ.*

(Court of Civil Appeals of Texas. San Antonio.)

1. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—SUFFICIENCY.

In an action on a policy of life insurance, defended on the ground of suicide, where there was no statement in defendant's brief as to any clause of the policy providing against suicide, and where it was assigned as

* Decision rendered, Jan. 28, 1914. Rehearing denied, Feb. 25, 1914. 163
S. W. Rep. 656.

error that the beneficiary could not, under its terms, recover more than one-tenth of the policy in case of suicide, the assignments should not be considered.

(For other cases, see Appeal and Error, Cent. Dig. §§ 2997-3001, 3022; Dec. Dig. § 724.)

2. INSURANCE — ACTION ON POLICY — PRESUMPTION AND BURDEN OF PROOF.

Under a policy excepting liability where insured commits suicide, the presumption of law is against suicide, and the insurer, defending on that ground, has the burden of establishing the fact, where the policy does require the beneficiary to establish that death was accidental.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.)

3. INSURANCE—ACTION ON POLICY—QUESTION FOR JURY—SUICIDE.

Where the facts, in an action on a policy of life insurance excepting liability in case of suicide, indicated that the death of insured was caused by accident or by suicide, it was for the jury to say whether defendant had sustained the burden of removing the presumption against suicide.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

4. INSURANCE—EXTENT OF RECOVERY—INTEREST.

Where the beneficiary, under a policy of life insurance after death of the insured, demanded the amount of the policy, refused the amount offered by the insurer, and began suit for and recovered the amount of the policy, she was entitled to interest on such amount.

(For other cases, see Insurance, Cent. Dig. § 1791; Dec. Dig. § 666.)

5. INSURANCE—ACTION ON POLICY—AMOUNT OF RECOVERY —ATTORNEY'S FEES.

In such case the beneficiary was entitled to attorney's fees.

(For other cases, see Insurance, Cent. Dig. § 1791; Dec. Dig. § 666.)

Appeal from District Court, Webb County; J. F. Mullally, Judge.

Action by Maria M. Jiminez against the First Texas State Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

H. G. Dickinson, of Laredo, for Appellant.

Greer & Hamilton, of Laredo, for Appellee.



MAXEY vs. FRANKLIN LIFE INS. CO. ET AL.*

(Court of Civil Appeals of Texas. Ft. Worth.)

1. INSURANCE — ACTION ON POLICY — SUBSTITUTION OF BENEFICIARY — UNDUE INFLUENCE — SUFFICIENCY OF EVIDENCE.

In a controversy between the wife of an insured and an illegitimate daughter as to the proceeds of an insurance policy, evidence held to sustain

* Decision rendered, Jan. 10, 1914. Rehearing denied, Feb. 7, 1914. 164 S. W. Rep. 438.

a finding that the wife induced the insured by undue influence to substitute her, instead of the daughter, as beneficiary of the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

2. INSURANCE — ACTION ON POLICY — ADMISSIBILITY OF EVIDENCE.

Where in a controversy between an illegitimate daughter and the wife of an insured as to the proceeds of a policy, the daughter charged that the wife induced the insured by undue influence to substitute her, instead of the daughter, as beneficiary, and also that the insured was of unsound mind, evidence that the insured was very fond of the daughter, and expressed an intention at the time of changing the policy to provide for her in some other method, was relevant to such issues.

(For other cases, see Insurance, Dec. Dig. § 663.)

3. INSURANCE—INSURABLE INTEREST.

An illegitimate daughter has an insurable interest in the life of her father; the ties of blood being sufficient to overcome any reasonable supposed motive upon her part to bring about the death of her father.

(For other cases, see Insurance, Cent. Dig. §§ 158-162; Dec. Dig. § 116.)

4. TRIAL—SPECIAL ISSUES—SUBMISSION.

It is within the discretion of the trial judge whether to submit the case on special issues, or to submit it in a general charge.

(For other cases, see Trial, Cent. Dig. §§ 823-827; Dec. Dig. § 349.)

5. APPEAL AND ERROR—REVIEW—HARMLESS ERROR.

Where, in a controversy between a wife and an illegitimate daughter as to the proceeds of a life policy, the issue was whether the wife by undue influence induced the insured to substitute her for the daughter as beneficiary, any error in refusing to admit evidence of immoral environments in the home of the daughter at the time of the change was not prejudicial, as it was shown by other evidence that the insured was aware of the conditions, and hence was no cause for reversal under rule 62a (149 S. W. x).

(For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.)

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.
Action on insurance policy by Mrs. Annie W. Maxey against the Franklin Life Insurance Company, in which Villita Maxey intervened, claiming the proceeds of the policy. From a judgment for intervener, plaintiff appeals. Affirmed.

Stennis & Wilson, of Weatherford, and Gross & Gross, of Mineral Wells, for Appellant.

John W. Moyers, of Mineral Wells, J. T. Ranspot, of Palo Pinto, and Hood & Shadle, of Weatherford, for Appellees.

FIRE, TORNADO, ETC.

**UNITED STATES CIRCUIT COURT OF APPEALS.
THIRD CIRCUIT.**

COMMERCIAL UNION ASSUR. CO., LIMITED,

vs.

DALZELL.

LONDON & LANCASHIRE FIRE INS. CO.

vs.

SAME (Nos. 1,792, 1,793.)*

1. INSURANCE — FIRE POLICY — CONSTRUCTION — TIME TO SUE.

Where a fire policy provided that in the event of disagreement as to the amount of the loss the same should be fixed by appraisement, and that the award should "determine the amount of such loss," and that the company should pay the same within sixty days after due notice, ascertainment, estimate, and satisfactory proof of loss, no suit could be lawfully brought on the policy until the amount to be sued for had been so determined.

(For other cases, see Insurance, Cent. Dig. §§ 1520-1528; Dec. Dig. § 612.)

Conditions in policy as to time for bringing suit, see notes to Steele vs. Phoenix Ins. Co., 2 C. C. A. 473; Rogers vs. Home Ins. Co., 35 C. C. A. 404.)

2. INSURANCE — FIRE POLICY — LOSS — AMOUNT — DETERMINATION BY ARBITRATION — CONCLUSIVENESS.

Where a fire policy provided that in the event of a disagreement as to the amount of the loss the same should be ascertained by two competent and disinterested appraisers, one to be selected by the insurance company and the other by the insured, and the two to select an umpire and together should appraise the loss, and the award in writing of any two should determine the amount of such loss, the award of the appraisers was conclusive on both parties and fixed the amount of the insured's liability.

(For other cases, see Insurance, Cent. Dig. §§ 1430-1432, 1434; Dec. Dig. § 574.)

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by John Dalzell against the Commercial Union Assurance Company, Limited, and against the London & Lancashire Fire Insurance Company. Judgment for plaintiff in each case, and defendants bring error. Reversed.

* Decision rendered, Jan. 29, 1914. 210 Fed. Rep. 605.

Before Gray, Buffington, and McPherson, C. J.J.

Jennings & Jennings and S. S. & C. B. Mehard, all of Pittsburgh, Pa., for Plaintiffs in Error.

Richard H. Hawkins, of Pittsburgh, Pa., (Dalzell, Fisher & Hawkins, of Pittsburgh, Pa., of counsel), for Defendant in Error.

J. B. McPHERSON, C. J.

These two cases were tried together in the district court, and do not need separate attention here. They arise under the following circumstances:—

In June, 1907, the plaintiff, who owned a large building in Wilkinsburg, Pa., insured it for \$45,000 in several companies; each of the defendants writing a policy of \$2,500. In March, 1908, a fire occurred, and much damage was done. A dispute arose immediately about the amount of the loss; the plaintiff asserting the damage to be nearly \$35,000, and the defendants contending for a much lower sum. In such a situation, if we turn to the contract—as we must—in order to ascertain the rights of the respective parties, we find the following provisions:—

The sum covered by the policy is not to exceed \$2,500, and the company is not to be liable:—

“beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality.”

And, as disputes arise continually between insurer and insured concerning the amount of loss, the policy goes on to provide:—

“Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers as hereinafter provided.”

[1] The subsequent provisions thus referred to are as follows:—

“In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage; and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expense of the appraisal and umpire.”

It will be observed that this award is to “determine the amount of such loss,” and obviously no suit can be brought until the

amount to be sued for shall be thus determined. And, indeed, the suit cannot be brought immediately, even after the award has been made; for in two places the policy expressly provides as follows:—

“* * * And, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable in sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss, have been received by this company in accordance with the terms of this policy. * * *

“And the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required, have been received by this company, including an award by appraisers when appraisal has been required.”

[2] It will thus be seen that the office of the award is to determine the amount of the loss; for reasons not connected with the award, the company may not be liable at all, but if liable it must pay the amount thus determined. And this amount is binding upon both parties; they so agree, and of course they are bound by their contract.

Other preliminary conditions must also be complied with by the insured, before he can acquire a right to sue. Especially, he must give immediate notice of the loss—this is not in dispute, and need not be considered—and he must also:—

“within sixty days after the fire, unless such time is extended in writing by this company, render a statement to this company, signed and sworn to by such insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof, and the amount of loss thereon, etc.” (specifying what is usually required in proofs of loss).

As all these preliminary conditions are for the company's benefit, the company may waive them, and this possibility is expressly recognized in other clauses of the policy. One clause guards against the contingency that the mere fact of agreeing to an appraisal may be construed as a waiver:—

“This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for.”

And another clause attempts to ordain a particular method by which waiver is to be proved:—

“* * * No officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and, as to such provisions and conditions, no officer, agent, or representative shall have such power or be deemed or held to have waived

such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto."

After a right to sue has been acquired by the performance of the stipulated conditions precedent, the insured is required to sue within a specified time:—

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

Each policy was accepted subject to these stipulations and conditions; it is the voluntary contract of the parties by which they have chosen to be bound. Courts have differed concerning the effect of the condition concerning appraisal. The Supreme Court of Pennsylvania holds it to be revocable. Its position will appear by the following extract from the opinion in *Commercial, etc., Co. vs. Hocking*, 115 Pa. 414, 8 Atl. 591, 2 Am. St. Rep. 562:—

"It is undoubtedly true, when the parties to an executory contract agree that all questions of difference or dispute which may arise between them in reference thereto, or that the amount of any claim arising therefrom, shall be first submitted to the arbitration of a single individual, or tribunal named, they are bound by their contract, and cannot seek redress elsewhere, until the arbiter agreed upon has been discharged, either by the rendition of an award, or otherwise. *Monongahela Nav. Co. vs. Fenlon*, 4 Watts & S. (Pa.) 205; *Connor vs. Simpson*, 104 Pa. 440; *Hostetter vs. City of Pittsburgh*, 107 Pa. 419. But it is equally true that where the agreement in question does not provide for submitting matters in dispute to any particular person or tribunal named, but to one or more persons to be mutually chosen by the parties, it is revocable by either party; and such provision is not adequate to oust the jurisdiction of the courts having cognizance of the subject-matter of the dispute. *Gray vs. Wilson*, 4 Watts (Pa.) 41; *Menz vs. Armenia Fire Ins. Co.*, 79 Pa. 480 (21 Am. Rep. 80); *Hostetter vs. City of Pittsburgh*, *supra*."

See, also, *Needy vs. Insurance Co.*, 197 Pa. 460, 47 Atl. 739.

But the Supreme Court of the United States takes a different view. In *Hamilton vs. Insurance Co.*, 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419, the court said, in considering a policy, not essentially different from those now in question:—

"The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action.

"Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and this

country. Scott vs. Avery, 5 H. L. Cas. 811; Viney vs. Bignold, 20 Q. B. D. 172; Delaware & Hudson Canal vs. Pennsylvania Coal Co., 50 N. Y. 250; Heed vs. Washington Ins. Co., 138 Mass. 572; Wolff vs. Liverpool & London & Globe Ins. Co. 50 N. J. Law, 453 [14 Atl. 561]; Hall vs. Norwalk Ins. Co., 57 Conn. 105, 114 [17 Atl. 356]. The case comes within the general rule long ago laid down by this court: 'Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so.' United States vs. Robeson, 9 Pet. 319, 327 [9 L. Ed. 142]. See, also, Martinsburg & Potomac Railroad vs. March, 114 U. S. 549 [5 Sup. Ct. 1035, 29 L. ed. 255]."

Numerous cases to the same effect are collected in 4 Cooley, Insurance Briefs, 3597.

It thus appears that in the federal courts the insured is bound by the appraisal clause, and must do all that he can to carry it into effect. If an award is made, both parties are bound by it.

Having thus ascertained the rights of the parties under the policies in suit, let us see what was done. The fire occurred on March 10th, and the plaintiff gave notice thereof. A dispute arose at once about the amount of the loss, and on March 27th appraisers and an umpire were duly chosen. The appraisal agreement is in writing; it follows the policy strictly; provides that the appraisers shall ascertain, pursuant to the terms and conditions of the policy, the sound actual cash value on March 10th and the actual loss or damage directly caused by the fire; declares that the award of any two "shall determine the amount of such loss"; lays down rules for ascertaining the loss; and provides that the appraisement:—

"* * * does not in any respect waive any of the provisions or conditions of said policies of insurance or any forfeiture thereof, or the proof of such loss and damages required by the policies of insurance thereon."

The award was not made until June 13th, when the umpire and one appraiser determined "the actual damage * * * to be \$27,524." Each company's share of this loss would be \$1,720.25, while its share under the plaintiff's estimate would be \$2,150.37. The difference is not large, but apparently it could not be adjusted. No proofs of loss had yet been filed, although more than sixty days had elapsed since the fire; but in this matter no fault appears on the part either of the plaintiff or of the company, and the company very properly did not set up the lapse of time as a bar to the plaintiff's claim. On the contrary, it was willing to

accept proofs of loss in spite of the sixty days' provision; but it refused to accept them unless they conformed to the award on the subject of amount. The company's position was that the award was binding upon both parties as to amount, while the plaintiff took the opposite position and declined to be bound thereby. Accordingly, on June 25th he sent proofs to the company in which he ignored the award altogether, itemized the loss at \$34,405.87, and claimed \$2,150.27 from each of the defendants. The company insisted—and, as we think, correctly insisted—that the award must be complied with, and on July 3d (after acknowledging the receipt of the proofs) went on to say:—

"The company declines to accept these as proofs, as they do not accord with the award of the appraisers, which is binding on both of us. Under this award the pro rata proportion due you from this company is \$1,720.23, which we are ready and willing to pay you, and not \$2,150.57 as claimed by you.

"If it shall be alleged or claimed by you that said award of appraisers for any reason is not binding upon you, than this company objects to the papers purporting to be proofs of loss, and declines to accept them for the reason that they were not served upon this company within sixty days after the fire as required by the terms and conditions of the said policy.

"The papers are returned herewith."

It is clear therefore that the only point in dispute between the parties was the effect of the appraisal, and, as we have already intimated, we think the company's construction of the contract was correct. There is no evidence, and indeed there is no contention, that the company ever waived this position. It was certainly entitled to insist that proofs of loss should be furnished. In strictness such proofs should have been offered within sixty days after the fire, but there was evidently good reason why this strict requirement should not—and perhaps it could not—be insisted upon. But in any event it is clear that the company did not insist upon it; on the contrary, it expressly agreed to accept proofs although the sixty days had passed, but it did stand by the position that these proofs must conform to the appraisal, since both parties had agreed to be bound thereby. Neither then nor thereafter was it obliged to accept proofs that paid no attention to the appraisal and insisted upon a different estimate of the damage, made up outside of the contract and in disregard of its provisions. There was no misunderstanding between the parties on this subject; the plaintiff was in no way misled or injured by anything that was done or said. He knew that proofs would be accepted, and that the loss would be paid, if he would agree to the amount awarded; but this he declined—as of course he had a right to do, but at his own risk—and in December of the same year he brought suit in the state court, still claiming \$2,150.27 from each defendant. (Four years later, he amended his claim by leave of the dis-

trict court, but, for reasons that will presently appear, we do not go into matters connected with the amendment.)

The trial judge submitted to the jury as "the sole question" on which the verdict must turn:—

"Whether or not, it appearing that proofs of loss were not furnished by the plaintiff to the defendant companies within sixty days of the date of the fire, which was March 10, 1908, the defendant companies have waived that provision."

In our opinion there was no evidence of waiver to be submitted, and, to speak precisely, the real point is not a question of waiver at all. The question is one of law, arising upon a written instrument, and is not a question of fact. As we regard the case, it turns upon this: Did the policy require the plaintiff to conform to the appraisal in his proofs of loss? If the proofs he did file had conformed to the award and had otherwise complied with the policy, and if the company had insisted that these proper proofs were not offered in time, then of course it would be important to decide whether the company had waived the sixty days' limit. But we repeat, the company was objecting only to a particular aspect or item of the proofs themselves, and did not object to the lapse of time. It agreed to accept the proofs if they were changed in one specified particular; this had been the dispute from the beginning, and both parties knew all about it. The plaintiff's attitude was not altered in the least in consequence of anything that was done by the company. He merely continued to maintain his original attitude, and refused to make the only change that was pointed out as necessary. He never supposed that the company was waiving its position about the effect of the appraisal, and he never changed his own. The case of Astrich vs. Insurance Co., 65 C. C. A. 251, 131 Fed. 20, is not in point, for the doctrine of estoppel does not apply, unless a plaintiff's position has been changed to his detriment. Even now it is not contended that the company ever relinquished the position that the appraisal was binding upon both parties, and therefore it seems unnecessary to prolong the discussion. The question submitted to the jury was not the point of the case, and upon the record before us the defendants were entitled to binding instructions in their favor.

We do not depreciate the importance of the other questions that are raised by the companies; but, as the matter we have discussed is fundamental, we do not even state them. We feel impelled, however, to express the hope that the parties may still settle this controversy on an equitable basis. The companies have already conceded—and have properly conceded—their liability in a certain amount, and the subsequent dispute (no matter what its final result has been) should not be an impassible obstacle to an adjustment on fair and reasonable terms.

In each case the judgment is reversed, but without prejudice to

the right of the plaintiff below to bring such other suit as he may be entitled to prosecute in whatever forum may have jurisdiction thereof.

SUPREME COURT OF NEW YORK.
APPELLATE DIVISION. THIRD DEPARTMENT.

COYKENDALL

vs.

BLACKMER.*

**INSURANCE — MORTGAGEE CLAUSE — CONSTRUCTION —
“PROVIDED.”**

The clause, “provided that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee shall, on demand, pay the same,” being a part of the mortgagee clause of the New York Standard policy, and issued to a mortgagee upon the application and at the request of the mortgagor, in accordance with a covenant of the mortgage, *held* a condition and not a covenant, since the word “provided” means “if,” or “on condition,” and is used to express a condition.

(For other cases, see Insurance, Cent. Dig. §§ 392, 393; Dec. Dig. § 182.)
(For other definitions, see Words and Phrases, vol. 6, pp. 5749-5751; vol. 8, p. 7770.)

Smith, P. J., dissenting in part.

Appeal from Trial Term, Chemung County.

Action by Jacob Coykendall against Franc B. Blackmer, executrix of George M. Blackmer, deceased. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before Smith, P. J., and Kellogg, Lyon, Howard, and Woodward, JJ.

Brendel, Standart & Bagot, of Buffalo (Francis E. Bagot, of Buffalo, of counsel), for Appellant.

Herenden & Mandeville, of Elmira (Bertram L. Newman, of Elmira, of counsel), for Respondent.

LYON, J.

The decision of this appeal depends upon the construction to be given to the New York Standard mortgagee clause. In 1906 George M. Blackmer became the mortgagee of real property situated in the city of Elmira, N. Y., the mortgage containing the following provision:—

* Decision rendered, March 4, 1914. 146 N. Y. Supp. 631.

"Second; that the parties of the first part will keep the buildings on said premises insured against loss by fire for the benefit of the mortgagee."

This action is against the executrix of the mortgagee to recover the amount of the premiums upon twenty fire insurance policies, which at the request of the owner, who was also the mortgagor, of the premises insured, and in compliance with the above-quoted provision of the mortgage, had been issued and delivered to the mortgagee by the plaintiff, who was a fire insurance agent. Nine of the policies were issued in 1907 for the term of three years, and were renewed for a like term in 1910. The other two policies were for one year each. Each policy insured the mortgagor as owner, and had attached thereto a mortgagee slip as follows:

"Mortgagee Clause.

"New York Standard.

"Loss or damage, if any, under this policy, shall be payable to George M. Blackmer, as mortgagee (or trustee) as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

"Provided, also, that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

"This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this company shall have the right, on like notice to cancel this agreement.

"Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgagee debt, or may as its option, pay to the mortgagee

(or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of their claim.

"Attached to and forming part of policy No. (Naming insurance company). Agent."

None of the policies were procured by the mortgagee, or issued at his request, but all were mailed to and received and retained by him, whether with the knowledge of the contents of the policy and attached slip does not appear, and is perhaps not material. The premiums aggregating upwards of \$300 were due and payable upon the issuance and delivery of the policies, and were charged by the various insurance companies issuing them to the plaintiff, and were charged by the plaintiff upon his books of account to the owner, and were accounted for and paid by the plaintiff to the various insurance companies in his monthly settlements following the dates of issue. No part of the premiums was ever paid by the owner, nor any effort made by plaintiff to enforce collection thereof from her. No demand for payment of any portion of the premiums was made by the plaintiff upon the mortgagee until in January, 1911. The mortgagee died in April, 1912, and soon thereafter letters testamentary upon his estate were issued to the defendant, who, upon presentation by plaintiff of a claim for the payment of said premiums, rejected the same. In March, 1912, the plaintiff obtained from the various insurance companies issuing said policies assignments of all moneys due and to become due from, and all causes of action against, the defendant, and particularly of any cause of action which had arisen by reason of the issuance of such policies.

In October, 1912, this action was brought. The trial court found the facts, which were in effect conceded, as hereinbefore stated, but held as conclusions of law that the mortgagee became obligated to pay the plaintiff the amounts of said insurance premiums, with interest thereon from the dates upon which the premiums became due, and the defendant was indebted to the plaintiff in such sum. From the judgment entered upon such decision, this appeal has been taken. The defendant filed no exceptions to the findings of fact of the trial court, but based his appeal solely upon the ground that the conclusions of law were not warranted by the findings of fact. The only question, therefore, before us is whether the plaintiff, as matter of law, is entitled to a recovery; that is, whether the clause, "provided that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same," should be construed as a covenant upon the part of the mortgagee to pay the premium in the event of the neglect of the mortgagor to pay the same, or should be construed merely as a condition

which, if not complied with by the mortgagee, would foreclose him of the right to a recovery given him in the preceding portion of the mortgagee clause, notwithstanding the happening of any of the prohibited matters specified therein, which, under the conditions of the policy itself, would render the policy void. It must be conceded that unless the clause in question constituted a covenant, no recovery can be had in this action.

We are of the opinion that the word "provided" was used in the sense of "if" or "on condition," and hence that the cause referred to should be construed as a condition and not as a covenant. The word "provided" is defined by several authorities as follows: By Webster: "On condition, by stipulation, with understanding, if." By Encyclopedia of Law and Procedure: "On condition, by stipulation, the appropriate term for creating a condition precedent, sometimes used in the sense of unless." In Robertson vs. Caw, 3 Barb. 410, 418: "The appropriate term for creating a condition precedent." In Locke vs. Farmers' Loan & Trust Co., 140 N. Y. 135, 148, 35 N. E. 578, 582: "The word 'provided' usually indicates a condition." And, to the same effect, Brennan vs. Brennan, 185 Mass. 560, 71 N. E. 80, 102 Am. St. Rep. 363. In Rich vs. Atwater, 16 Conn. 409, 418: "The proviso, it is said, requires such a construction. There has been much nice discussion upon the word 'provided.' 2 Co. 72; Cro. Eliz. 242, 385, 486, 560; Cro. Car 128. It is certain as is said by Judge Swift, that there is no word more proper to express a condition than this word 'provided'; and it shall always be so taken, unless it appears from the context to be the intent of the parties that it shall constitute a covenant. [Wright vs. Tuttle] 4 Day, 326." Many authorities in other states might be cited to the same effect.

Unquestionably the mortgagee clause constituted a new agreement between the insurance company and the mortgagee, and was attached to the policy for the purpose of enabling the mortgagor to perform the covenant of insurance contained in the mortgage, and in consideration of the taking of the policy by the mortgagor. It must be interpreted in such a manner as to carry out the intention of the parties, and for that purpose the whole clause must be considered. While the mortgagee clause was for the benefit of the mortgagee in the respect before referred to, it was for the benefit of the insurance company in that it required the mortgagee to notify the company of any change of ownership or occupancy or increase of hazard which should come to his knowledge, and to pay the premium for the increased hazard; otherwise the policy should be null and void. It also gave the insurance company, upon the payment of any sum to the mortgagee as loss or damage under the policy, the right, upon claiming that as to the owner no liability existed, to be subrogated, to the extent of such payment, to all the rights of the mortgagee, or at its option to pay the mortgagee the amount of the mortgage and receive an

assignment thereof, and of all securities held as collateral to the mortgage debt.

The apparent meaning of the mortgagee clause is that the insurance as to the interest of the mortgagee, shall not be invalidated by any act or neglect of the mortgagor, if the mortgagee shall on demand pay any unpaid premium, and hence that if the mortgagee shall on demand neglect or refuse to pay the unpaid premium, he shall no longer be entitled to avail himself of the stipulation that no act or neglect upon the part of the mortgagor shall invalidate the policy, but the insurance of the interest of the mortgagee shall thereafter be governed by the policy itself, and this was doubtless the relation of the mortgagee and the insurance companies following the demand of the company for the payment of the premium in January, 1911, and the neglect of the mortgagee to pay the premiums.

We are referred by the briefs of the respective counsel to but two cases in which the main question at issue here seems to have been decided, St. Paul Fire Insurance Co. vs. Upton, 2 N. D. 229, 50 N. W. 702, and Safe Deposit Co. vs. Thomas, 59 Kan. 470, 53 Pac. 472. In the former case the question arose upon a demurrer to the complaint, and the mortgagee took the novel position that the mortgagee clause could not be effective unless the mortgagee had paid the premium, which he could not have had the opportunity of doing in case the mortgagor paid it on time. In the latter case, the agent of the mortgagee negotiated with the agent of the insurance companies for the insurance, furnished the mortgagee slips, and the mortgage contained a covenant upon the part of the mortgagor to pay the insurance premiums, and a provision that if such payments were not made, the mortgagee might pay the premiums, and that the amount so paid, with interest at the rate of 12 per cent per annum, should be a lien on the premises. The court apparently considered this clause, providing for the reimbursement of the mortgagee for any premiums paid by him, as important as bearing upon the intention of the parties that the mortgagee clause should be construed as a covenant. The mortgage in the case at bar contained no such provision. While it provided that the mortgagor would keep the buildings on the premises insured against loss by fire for the benefit of the mortgagee, the construction required by the statute to be given such condition was that, in the event of the default of the mortgagor to keep the buildings insured, and the policies delivered to the mortgagee, the mortgagee might make the insurance, pay the premiums, and add the amount so paid with interest to the mortgage debt. Real Property Law, § 254, subd. 3 (Consol. Laws., c. 50 [Laws 1909, chap. 52]). The policies in question were never canceled, and in case they had been, the mortgagee, by the terms of the mortgagee clause, had ten days after notice of cancellation in which to procure other insurance,

and there was no time during the six-year period of their existence when the buildings were not kept insured by the mortgagor and the policies in the possession of the mortgagee, and hence the mortgagee was not at any time authorized to pay the premiums and tack the sum so paid to the mortgage debt. Evidently the plaintiff relied upon the mortgagor for payment, as it was nearly four years after the issuance of the first policies, and one year after the expiration of eleven of the policies, before the plaintiff made demand upon the mortgagee for payment of premiums, and, so far as appears, such demand was the first notice which the mortgagee had that the premiums had not been paid by the mortgagor. The plaintiff had the power to protect himself against loss by reason of nonpayment of premium by the mortgagor by canceling the policy, which one of the conditions thereof gave him the right to do on five days' notice.

Opposed to the two cases above cited is that of Ormsby et al. vs. Phenix Insurance Co. of Brooklyn, 5 S. D. 72, 58 N. W. 301, holding that such clause constituted a condition and not a covenant.

The provision that no act or neglect of the mortgagor shall invalidate the insurance as to the interest of the mortgagee is not in any way dependent for consideration or validity upon the provision that the mortgagee shall, upon default of the mortgagor, pay the unpaid premiums, as it was held, prior to the insertion in the mortgagee clause of the latter provision, that the former was valid and enforceable. Hastings vs. Westchester Fire Ins. Co., 73 N. Y. 141. Subsequent to the time of this decision the latter provision was inserted. Had the intention been that the provision should be construed as a covenant rather than as a condition, a slight modification thereof or the addition of the words, "which the mortgagee hereby covenants to do," would naturally have been inserted and thereby all ambiguity removed.

"The general rule to be observed in the construction of an insurance policy is that, if possible, effect should be given to every word and expression contained therein, and if the policy be susceptible of two readings, or is so ambiguously expressed that reasonable and intelligent men on reading it might honestly differ as to its meaning, that reading must be adopted which is most favorable to the insured. Kratzenstein vs. Western Assurance Co., 116 N. Y. 54, 22 N. E. 221, 5 L. R. A. 799; Lite vs. Firemen's Ins. Co., 119 App. Div. 410, 104 N. Y. Supp. 434.

"While it is the duty of the court to so construe the policy as, if possible, to give effect to every word used, if the sense in which the words were used is uncertain and the meaning is ambiguous, that meaning should be given which is most favorable to the insured" (citing several cases). Rickerson vs. Hartford Fire Ins. Co., 149 N. Y. 307, 43 N. E. 856.

To the same effect, Janneck vs. Metropolitan Life Ins. Co.,

162 N. Y. 574, 57 N. E. 182; London Assurance Co. vs. Thompson, 170 N. Y. 94, 62 N. E. 1066.

We conclude that the provision in question should be construed as a condition rather than as a covenant, which leads to a reversal of the judgment and a dismissal of the complaint upon the merits. In view of such conclusion we have considered it unnecessary to discuss the subject as to the effect of the assignments by the insurance companies to the plaintiff. All concur.

SMITH, P. J. (concurring).

I am unable to agree with Mr. Justice Lyon in his construction of this contract. As I construe the contract the provision of the policy in question constitutes a covenant on the part of the mortgagee, if the insurance policy be accepted by him, to pay under the terms thereof. In the first place, before the word "provided" is a semicolon, which would be out of place if what followed were a mere condition of what preceded. While this fact of itself has not much significance, in a close question connected with other facts it is worthy of note. In the second place, the word "provided," which separates the two clauses, is printed in capital letters. This would not ordinarily be so if the clause thus introduced were merely a condition attached to what preceded it. Again, by section 254 of the Real Property Law, subdivision 3, if the mortgagor fails to keep the property insured, the mortgagee may do so, and charge the amount of the premiums paid as a part of the debt secured by the mortgage. The mortgagee and the insurance company are thus protected, and the mortgagee is given his right to reimbursement from the mortgagor. These considerations indicate the intention of the Legislature to make this provision of the contract a covenant on the part of the mortgagee upon the acceptance of the policy by him. This construction is further in accord with the holding of the court in the case of St. Paul Fire & Marine Insurance Co. vs. Upton, 2 N. D. 229, 56 N. W. 702; and also in the case of Safe Deposit Co. vs. Thomas, 59 Kan. 470, 53 Pac. 472. I do not read in the case of Ormsby vs. Phenix Insurance Co., 5 S. D. 72, 58 N. W. 301, any different rule of construction. The clause of the policy there construed was an entirely different clause, and could in no event, without forced construction, have been held as imposing a covenant upon the part of the mortgagee.

It does not follow, however, that the defendant is liable in this action. The mortgagee is to pay these premiums on demand. This demand cannot be made capriciously at the convenience of the insurance company, but must be made in the usual course of business. That means within a reasonable time upon the failure of the mortgagor to pay the insurance. This interpretation is in accord with the interpretation of analogous contracts. An endorser upon a note payable on demand is only made liable if the

demand be made within reasonable time. Moreover, under the provision of the Real Property Law cited, upon failure of the mortgagor to procure insurance, the mortgagee may declare the whole amount of the mortgage due and proceed to foreclose. It will hardly be claimed that the insurance company may wait until after the mortgage had been foreclosed, and then make demand and collect this premium. By parity of reasoning the insurance company should not be allowed to wait beyond a reasonable time before making the demand of the mortgagee, which is made a condition of the mortgagee's liability to pay. If made promptly, the mortgagee might either declare the mortgage due and foreclose, or force the mortgagor to pay the premiums. In the case at bar nine of the insurance policies for which the premiums are sought to be collected, were taken out in 1907, and eleven others were taken out between February 13, 1908, and July 13, 1910; the policies taken out in 1907 having expired in 1910. The first request to the mortgagee to pay was made in January, 1911, which was the first notification to the mortgagee that these premiums had not been paid by the mortgagor. Because, therefore, the demand was not made within a reasonable time in the due course of business, the mortgagee has, in my judgment, been relieved of the obligation to pay these premiums.

**UNITED STATES DISTRICT COURT.**

N. D. NEW YORK.

J. E. DAVIS MFG. CO.

vs.

FIREMEN'S FUND INS. CO. ET AL.*

1. INSURANCE—FIRE LOSS — ADJUSTMENT — PROCEEDINGS BEFORE APPRAISERS.

While a proceeding by appraisers and an umpire to adjust a fire insurance loss need not be conducted with the formalities of a trial in a court of law or equity, there must, nevertheless, be a fair effort on the part of the appraisers and umpire to ascertain the truth, and a consideration of available evidence and information, and a deliberate judgment of those making the award after due consultation and deliberation.

(For other cases, see Insurance, Cent. Dig. §§ 1422, 1423, 1427, 1429; Dec. Dig. § 572.)

2. INSURANCE — ADJUSTMENT OF LOSS — DUTY OF APPRAISER.

Appraisers as well as an umpire appointed to determine an insurance loss

* Decision rendered, Feb. 5, 1914. 210 Fed. Rep. 653.

should not only be competent but fair and unprejudiced as between the parties to the award, and a refusal or willful neglect of an appraiser or umpire to listen to and consider material sworn statements presented is evidence of bias and interest.

(For other cases, see Insurance, Cent. Dig. §§ 1430-1432, 1434; Dec. Dig. § 574.)

3. INSURANCE — DETERMINATION OF LOSS — APPRAISAL.

Where appraisers and an umpire are appointed to determine an insurance loss, it is the duty of the appraisers to consult, and, if they cannot agree, to call in the umpire, whose function is to deliberate with them; it being improper for one or two to consider evidence not submitted to the other or others.

(For other cases, see Insurance, Cent. Dig. §§ 1422, 1423, 1427, 1429; Dec. Dig. § 572.)

4. INSURANCE — LOSS — ADJUSTMENT — APPRAISAL — INVALIDITY.

Where the appraisers and an umpire appointed by an insurance company to adjust a loss were not impartial and signed an award for an amount much less than the actual loss, after having refused to consider relevant evidence on such subject, the award would be set aside for fraud.

(For other cases, see Insurance, Cent. Dig. §§ 1430-1432, 1434; Dec. Dig. § 574.)

In Equity. Suit by the J. E. Davis Manufacturing Company against the Firemen's Fund Insurance Company and others to set aside and declare void a certain award of appraisers in proceedings to adjust a fire insurance loss. Decree for complainant.

Davis & Lusk, of Cortland, N. Y., for Complainant.

White, Cheney, Shinaman & O'Neill, of Syracuse, N. Y., for Defendant Firemen's Fund Ins. Co.

RAY, D. J.

The salient facts may be stated as follows:—

1. "That the plaintiff, J. E. Davis Manufacturing Company, is a business corporation duly organized and existing under the laws of the state of New York, having its office and principal place of business in the city of Cortland, state of New York, and is a citizen and resides within said state of New York and within the judicial district of the United States known as the Northern district of New York."

2. "That the defendant Firemen's Fund Insurance Company is a corporation duly organized and existing under the laws of the state of California, having its principal place of business at San Francisco in said state, and at all times mentioned in the bill of equity herein and at the time of the commencement of this suit was a resident and citizen of the state of California and at all times in the said bill mentioned, and at the time of the commencement of this suit, was doing business within the state of New York, having duly complied with all of the requirements of the law of said state relative to the transaction of business therein,

and was at all times in said bill mentioned, and at the time of the commencement of this suit, authorized to do business within the state of New York."

3. "That the defendant the First National Bank of Cortland is a corporation duly organized and existing under the laws of the United States, and having its principal place of business in the city of Cortland in the state of New York, and at the time of the commencement of this suit was a citizen of and resided in said state of New York, and within the judicial district of the United States known as the Northern district of New York. That the defendant the National Bank of Cortland is a corporation duly organized and existing under the laws of the United States, having its principal place of business at the city of Cortland in the state of New York, and was at the time of the commencement of this suit a citizen of and resided in said state of New York, and within the judicial district of the United States known as the Northern district of New York. That the defendant Grace L. Mix, at the time of the commencement of this suit, was a citizen of the state of New York and resided in the city of Cortland in said state and within the judicial district of the United States known as the Northern district of New York. That the defendant John A. Wavle was at the time of the commencement of this suit a citizen of the state of New York and resided in the city of Cortland in said state, and within the judicial district of the United States known as the Northern district of New York. That the defendant Linus W. Peck, at the time of the commencement of this suit, was a citizen of the state of New York and resided in the city of Cortland in said state and within the judicial district of the United States known as the Northern district of New York. That the defendant Frank Begent was, at the time of the commencement of this suit, a citizen of the state of New York, and resided in the village of Groton in said state and within the judicial district of the United States known as the Northern district of New York. That the defendants herein the First National Bank of Cortland, the National Bank of Cortland, Grace L. Mix, John A. Wavle, Linus W. Peck, and Frank Begent are each jointly interested with the plaintiff in the maintenance of this suit. That upon bringing this suit the plaintiff duly requested each of the said defendants to join as coplaintiffs herein, and that each of said defendants refused so to do, and that the consent of none of the said defendants could be obtained to appear as plaintiffs in this suit."

4. "The matter in suit, exclusive of interest and costs, exceeds the sum of \$3,000."

5. "That this suit is brought in aid of and as ancillary to an action at law now pending in this court between this plaintiff and these defendants to recover upon the policy of insurance herein-after mentioned."

6. "That in and by its certain policy of insurance No. B-228343, duly signed by the president and secretary of said insurance company, and countersigned by the duly authorized agent of said company at the city of Cortland, N. Y., on or about the 15th day of September, 1911, which said policy of insurance was on or about that day delivered to the plaintiff herein by the defendant Firemen's Fund Insurance Company, in consideration of the sum of \$68 to it then paid by said J. E. Davis Manufacturing Company, did insure the said J. E. Davis Manufacturing Company against loss or damage by fire to the amount of \$8,000 on its property mentioned and described in said policy of insurance. That the said Firemen's Fund Insurance Company in and by said policy of insurance did promise and agree to pay and make good unto said J. E. Davis Manufacturing Company as coinsurer, under a full coinsurance clause as set forth in said policy of insurance, all such loss or damage not exceeding in amount the said sum of \$8,000, as should happen by fire to the property as therein specified, during the term of one year from the 15th day of September, 1911; such loss to be paid within sixty days after notice and satisfactory proof of said loss as in said policy provided."

7. "That on or about the 5th day of April, 1912, and while said contract of insurance was remaining in full force and effect, the buildings, additions, and attachments thereto, a concrete lumber shed, dry kilns, and contents of the same, also the contents of a car situate at the corner of East Court and Pendleton streets in the city of Cortland aforesaid, including office furniture, fixtures, and supplies, being the same property mentioned and described in said policy of insurance, and all the property upon the said premises was destroyed by fire, excepting a small quantity of veneer, some office furniture, and the boilers on said premises. That said fire did not occur from any of the causes excepted in said policy of insurance, and none of said property so destroyed was of the kind for the loss of which said defendant Firemen's Fund Insurance Company was exempted from liability under said policy."

8. "That at the time of said fire and loss, the J. E. Davis Manufacturing Company had, in addition to the said policy of insurance issued by the defendant Firemen's Fund Insurance Company, no other insurance either valid or invalid, nor by solvent or insolvent insurers, excepting thirty-five certain policies of insurance which were in full force and effect to the amount of \$207,750; said policies covering the same property covered by said policy above mentioned and described."

9. "That the defendants the First National Bank of Cortland and the National Bank of Cortland are the owners and holders of bonds, secured by a trust mortgage covering a part of the real property mentioned and described in said policy of insurance. That each of the defendants Grace L. Mix, John A. Wavle, Linus

W. Peck, and Frank Begent is the owner and holder of a bond secured by a mortgage covering a part of the real property mentioned and described in said policy of insurance. That under the terms of said policy of insurance issued by said defendant to said J. E. Davis Manufacturing Company loss on real estate was payable to the said defendants, the First National Bank of Cortland, the National Bank of Cortland, Grace L. Mix, John A. Wavle, Linus W. Peck, and Frank Begent, as their respective interest might appear."

10. "That the plaintiff, J. E. Davis Manufacturing Company, was at the time of the issuance of said policy and at the time of said fire and is the owner in fee simple of all of the said real estate in said policy described, and the unconditional and sole owner of all of the real estate and personal property covered by the said policy of insurance, except such personal property as was held by the said J. E. Davis Manufacturing Company in trust or on commission, sold but not delivered, as mentioned and provided in and by said policy of insurance."

11. "That said defendant Firemen's Fund Insurance Company failed to pay such loss, or any part thereof."

12. "That on or about the 18th day of November, 1912, the J. E. Davis Manufacturing Company, the plaintiff in this suit, commenced an action at law in the Supreme Court of the state of New York, in the county of Cortland aforesaid, against the same parties who are defendants in this suit; the purpose of said action being to recover judgment against the Firemen's Fund Insurance Company for the sum of \$7,978.32, with interest thereon from the 7th day of July, 1912, then claimed to be due, owing, and payable to this plaintiff from said defendant insurance company. That thereafter, upon motion of the defendant Firemen's Fund Insurance Company, said action was removed from the Supreme Court of the state of New York to the District Court of the United States for the Northern district of New York upon the ground that said action involved a controversy between citizens of different states; the matter in dispute between said parties exceeding, exclusive of interest and costs, the sum of \$3,000. That thereafter and on or about the 17th day of January, 1913, the said defendant Firemen's Fund Insurance Company filed its answer in the District Court of the United States for the Northern district of New York. The issues raised thereby are now pending undetermined on the law side in said district court. That in and by the answer interposed by said defendant Firemen's Fund Insurance Company, in said action at law, so removed from the Supreme Court of the state of New York to the District Court of the United States for the Northern district of New York, the said defendant insurance company set up and pleaded as partial defense thereto that under and pursuant to the terms of said policy an appraisal had been entered into for the purpose of

determining the amount of loss sustained by said J. E. Davis Manufacturing Company by reason of said fire, and that under said appraisal an award in writing had been made, fixing the sound value of the property insured on the 5th day of April, 1912, at the sum of \$157,474.04, and the actual damage thereto by fire on that day to be the sum of \$152,625.05; and the said defendant insurance company further alleged that the proportion of said loss for which said defendant would be liable under said policy, if liable at all, was the sum of \$5,659.34, and that in no event could a recovery be had against said defendant by reason of said policy for a greater sum. That under the law, practice, and procedure which was at the time of the beginning of said action at law in the Supreme Court of the state of New York, at the time of the removal thereof to the District Court of the United States for the Northern district of New York, and now is in force and effect in said state of New York, the plaintiff in said action at law so brought upon said policy of insurance might attack, controvert, and set aside the purported award so pleaded by the defendant Firemen's Fund Insurance Company, as a defense thereto, and the Supreme Court of that state in such law action might decree and adjudge, and a jury might find, that the award so pleaded as a defense was in fact invalid, ineffective, fraudulent, and void. That under the law, practice, and procedure which was at the time of the removal of said action at law from the Supreme Court of the state of New York to the District Court of the United States for the Northern district of New York, and still is in force and effect in the District Court of the United States, including the District Court for the Northern district of New York, the plaintiff in said action at law so brought upon said policy of insurance cannot attack, controvert, or set aside the award so pleaded by said defendant insurance company; nor can the district court in said law action decree or adjudge, nor can a jury find, that the award so pleaded is invalid, ineffective, fraudulent, or void. But the said award is binding and conclusive upon this plaintiff in said law action until the same shall be canceled or set aside at the suit of this plaintiff in a court of equity."

13. "That after the fire hereinbefore mentioned and referred to, the defendant Firemen's Fund Insurance Company, by its agent duly authorized, notified the plaintiff that it claimed the right under said policy to have the loss or damage to the buildings and machinery destroyed by said fire appraised by appraisers. That the J. E. Davis Manufacturing Company thereupon refused to agree to an appraisal of part only of the property destroyed by said fire, and thereupon demanded that the said Firemen's Fund Insurance Company, under the provisions of said policy, should have the entire loss or damage to such property by said fire appraised by appraisers, and thereafter the said Firemen's Fund Insurance Company, with the other insurance companies having

issued insurance policies covering said property, designated one Thomas Fleming as one of the appraisers, and the plaintiff, J. E. Davis Manufacturing Company, designated one Henry Stultz as one of said appraisers, and thereupon an instrument in writing was made and subscribed by the Firemen's Fund Insurance Company by its aforesaid agent and the other insurance companies aforesaid, and this plaintiff, dated the 24th day of June, 1912, which instrument was as follows:—

“ ‘Agreement for Appraisal.

“ This agreement by and between J. E. Davis Mfg. Co., of the first part, and the Insurance Company, or Companies, whose names are signed hereto, each for itself and not jointly, of the second part, witnesseth:—

“ That whereas, the party of the first part claims to have sustained a loss by fire occurring on the 5th day of April, 1912, to and upon the following described property, to wit:—

“ ‘J. E. Davis Manufacturing Co.

“ \$..... On brick metal-roofed building, additions and attachments thereto (excluding smokestack, also foundations below level of ground), and on concrete lumber shed, concrete and frame metal-roofed dry kiln, and contents of same. Also contents of trucks or cars, and lumber in yard or streets adjoining, situate corner of East Court and Pendleton streets, Cortland, N. Y. It is understood, and agreed that part of dry kiln is on land owned by the D. L. & W. R. R. Co.

“ It is understood and agreed that the word contents in this form shall cover office furniture, fixtures and supplies, and all property, its own, or held by them in trust or on commission, sold but not delivered, and this company shall be liable therefor; but the word contents shall not cover any articles excepted in line 38 of the Standard policy of the State of New York.

“ And whereas, a disagreement has arisen between the parties hereto, as to the amount of such loss, and

“ Whereas, it is provided by the policy (or policies) of said party (or parties) of the second part, held by said party of the first, that in the event of disagreement as to the amount of loss the same shall, as in said policy (or policies) provided be ascertained by appraisers.

“ Therefore this agreement witnesseth: That in conformity to the terms and conditions of the policy (or policies) of the party (or parties) of the second part, Henry Stultz and Thomas Fleming have been selected, and are merely appointed appraisers, to estimate and appraise, in accordance with the terms and conditions of said policy (or policies), the sound value of said property and the amount of loss or damage directly caused by said fire to and upon the same.

“ The said appraisers shall first select a competent and dis-

interested umpire, as provided by said policy (or policies); the said two appraisers together shall then estimate and appraise the loss in conformity to the conditions of said policy (or policies) stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss. Such loss or damage shall be ascertained or estimated according to the actual cash value of said property at the time of the occurrence of said fire, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality, but such appraisement does not in any respect waive any of the provisions or conditions of said policy (or policies) of insurance, or any forfeiture thereof, or the proof of such loss and damage required by the policy (or policies) of insurance thereon.

"Witness our hands in duplicate at Cortland, N. Y., this 24th day of June, 1912.

"J. E. Davis Mfg. Co.,

"Per J. E. Davis, Pres.

"Northern Assur. Co. of London; Security Ins. Co. of New Haven; Rhode Island Ins. Co. of Providence; Nationale Fire Ins. Co. of Paris; Globe Under. Agency Globe & Rutgers Ins. Co.; Globe & Rutgers Fire Ins. Co.; Ins. Co. of North America, Philadelphia; Firemen's Ins. Co. of Newark, N. J.; Pittsburg Under-writers of Pittsburg; Delaware Ins. Co. of Philadelphia; Atlas Assurance Co. of England; California Ins. Co. of San Francisco; Firemen's Fund Ins. Co. of San Francisco; City of New York Ins. Co.; Scottish Union & National Ins. Co.; Svea Fire & Life Ins. Co.; Commercial Union Assur. Co.; Michigan Fire & Marine Ins. Co.,

"By Harvey W. Russ, Adjuster for Each.

"North River Fire Ins. Co. of N. Y.; National Bern-Franklin Ins. Co.; Stuyvesant Ins. Co. N. Y.,

"By James H. Andrews, Adjuster for Each,
per Harvey W. Russ.

"North British & Mercantile Ins. Co.,

"By F. W. Kentner, S/A., per Harvey W. Russ.

"North Western National Ins. Co.,

"By John K. Sharkey, S/A., per Harvey W.
Russ.

"Norwich Union Assur. Co. of Eng.,

"By C. F. Gant, S/A., per Harvey W. Russ.

"Mechanics' & Traders' Ins. Co. of N. O.,

"By Clarence Rich, S/A., per Harvey W. Russ.

"Allemania Fire Ins. Co. of Pittsburgh; New Jersey Fire Ins. Co. of N. J.,

"By Geo. Berry, S/A., per Harvey W. Russ."

"That on the 24th day of June, 1912, the said appraisers at the city of Cortland, N. Y., signed and swore to a declaration of appraisers as follows:—

"Declaration of Appraisers.

"State of New York, County of Cortland—ss.:

"We, the undersigned, do solemnly swear that we will act with strict impartiality in making an appraisement and estimate of the sound value and loss and damage upon the property hereinbefore mentioned, in accordance with the foregoing appointment, and that we will make a true, just and conscientious award of same, according to the best of our knowledge, skill and judgment. We are not related to the assured, either as creditors or otherwise, and are not interested in said property or the insurance thereon."

"That on said 24th day of June in the city of Cortland, N. Y., the said appraisers did enter into and sign a selection of umpire which reads as follows:—

"Selection of Umpire.

"We, the undersigned, hereby select and appoint David Nicholson of Syracuse, New York, to act as umpire to settle matters of difference that shall exist between us, if any, by reason of and in compliance with the foregoing agreement and appointment."

"That on the 9th day of July, 1912, at the city of Cortland, N. Y., the said David W. Nicholson, selected as aforesaid, signed and swore to a qualification of umpire as follows:—

"Qualification of Umpire.

"State of New York, County of Cortland—ss.:

"I, the undersigned, hereby accept the appointment of umpire, as provided in the foregoing agreement, and solemnly swear that I will act with strict impartiality in all matters of difference that shall be submitted to me in connection with this appointment, and I will make a true, just and conscientious award, according to the best of my knowledge, skill and judgment. I am not related to any of the parties to this agreement, nor interested as a creditor or otherwise in said property or insurance."

"That on the 29th day of August, 1912, at the City of Syracuse, New York, the said Thomas Fleming, appraiser, and the said David W. Nicholson, umpire, signed an award as follows:—

"Award.

"We, the undersigned, pursuant to the within appointment, do hereby certify that we have truly and conscientiously performed the duties assigned us, agreeably to the foregoing stipulations, and have appraised and determined and do hereby award as the sound value of said property on the 5th day of April, 1912, and the

actual damage thereto by the fire on that day, the following sums, to wit:—

	Sound Value	Loss and damage
1st item.....	\$157,474.04	\$152,625.05'

14. "That the plaintiff duly served all notices of loss and all signed and sworn statements and proofs of loss provided for by said policy of insurance, and that the defendant Firemen's Fund Insurance Company waived the service of any additional statements and notice required by said policy of insurance, and that the plaintiff duly complied with all of the requirements of said policy in reference to notices, claims, and proofs of loss, and all conditions precedent to bringing a suit or action on said policy. That more than 191 days elapsed after the delivery and service by the plaintiff upon the defendant Firemen's Fund Insurance Company of the proofs of loss and statement provided for under said policy, and before the commencement of this action, and that twelve months had not elapsed after said fire before the commencement of an action at law upon said policy."

15. The said award of \$152,625.05, made and signed by Fleming and Nicholson, is inadequate in a large amount, as the value of said property insured and so destroyed by said fire was greatly and materially in excess of the said amount so fixed by said award.

16. The evidence is quite conclusive and satisfactory, and I must find that the appraiser selected by the defendant Firemen's Fund Insurance Company was not a competent and disinterested appraiser, and that the umpire so selected by the said appraisers was not a competent and disinterested umpire, and the selection of such umpire was secured and brought about by acts and conduct on the part of said Fleming and one Charles H. Philips amounting to fraud and was done collusively for the purpose of securing an umpire who was interested and biased in favor of the said insurance companies, and who was, in fact, biased and interested (nor financially interested) in favor of said insurance companies, and that the acts and conduct of said appraiser, Thomas Fleming, throughout the appraisal and proceedings connected therewith and upon the making of the award, indicated and showed a purpose to defraud the plaintiff by purposely and consciously bringing about and securing an appraisal and award grossly inadequate and largely less than the actual and bona fide loss by reason of such fire and which he succeeded in doing. In this the umpire, David Nicholson, was either a willing and a designing party, or so grossly negligent and disregardful of his duty to the parties interested that his conduct amounted and amounts to fraud in its results, and such award so made by said Fleming and Nicholson was in its effect and results a fraud upon the plaintiff, and that such award so made dated August 29, 1912, the award set up and pleaded in the law action before referred to, must be held invalid, ineffective,

fraudulent, and void, and not binding on the J. E. Davis Manufacturing Company.

The insurance, in the aggregate, was large, but the business was large and the plant a large one. There was a large stock on hand, and it was and is impossible to arrive at the exact value of such stock. There was a large amount of raw material, that is, sawed lumber upon which no further labor had been expended, but the greater part was in various stages of manufacture and a large amount was ready for delivery, that is, completed so far as the J. E. Davis Manufacturing Company completed such work. Many, and perhaps most, of the papers of said company were destroyed in the fire and to get at the actual loss with any reasonable certainty great care on the part of the appraisers and umpire was demanded and was the right of the insured. The situation was such as to demand the careful scrutiny of such appraisers and of the umpire, but it also demanded of them the securing and consideration of the best obtainable evidence. They had no right to assume a fraud or a false or an excessive claim of loss. There was no presumption on the face of the proofs of loss, made out in great detail, that the claim was excessive. They had no right unbiased and unprejudiced, to start in as they did with the assumption and declaration that they did not believe the J. E. Davis Manufacturing Company had sustained the loss claimed; that they did not believe it had, at the time of the fire, the amount of property or stock on hand, set out in the proofs of loss. At least, it was the duty of each of the appraisers and of the umpire to carefully consider the sworn statements and other evidence offered and submitted for their consideration. The defendant insurance company secured the services of an unsworn person who, acting as its agent, prepared a report as to the loss which was based in part on assumed profit, not based on any proof of fact or facts and which, in fact, was erroneous, and this report contained material errors and was materially misleading and gave values of material and stock on hand and destroyed in the fire at much less than their actual value. This agent of the insurance company acted upon insufficient evidence and ignored information at hand and available, but, nevertheless, the said Fleming, without making investigation as to the accuracy and reliability of such report, and utterly disregarding sworn statements as to the amount and value of such stock and material, accepted and acted upon such report. The evidence is convincing that Fleming without evidence assumed from the very beginning that the proofs of loss and claims of the insured were grossly exaggerated and fraudulent and adhered to that assumption, declining to examine into the facts and make an honest effort to ascertain the truth. This report of the agent of the insurance company was not furnished to the appraiser appointed and named by the plaintiff, J. E. Davis Manufacturing Company, for his information and consideration, and was not ex-

amined or considered by him. The result was, as to this, that Fleming and Nicholson, Nicholson making no examination or investigation as to the accuracy of such statement made by such agent of the defendant, acted on erroneous information and rejected and refused to consider sworn information offered.

The evidence also discloses that certain material evidence furnished by the plaintiff through its appraiser, Stultz, as to buildings and plumbing and its amount and value was not seen or examined by said Fleming. The evidence shows that these appraisers did not at any time consider in detail the quantity and value of the property destroyed by the fire, and insured, but, on the other hand, attempted to fix a value in gross without going over items and attempting to arrive at a fair and just estimate of their quantities and values. The appraisers and umpire did not go over the lists and statements of the property destroyed, furnished, or one of their own, together, and together never considered in any detail the quantity or value of the property destroyed, and the appraisers with the umpire never went over the list of such property destroyed by said fire for the purpose of attempting to arrive at an award which should be the result of the joint action and deliberations of either such appraisers or of said appraisers and said umpire. At best, the result arrived at by one appraiser and the umpire was arbitrary, and biased and based on unwarranted assumptions and inaccurate and biased information accompanied by a refusal to examine and consider the sworn evidence offered and consult and deliberate together.

[1] It is true that such a proceeding by appraisers and an umpire does not demand the formalities of a trial in a court of law or in equity, but does demand a fair effort to ascertain the truth and a consideration of available evidence and information and the deliberate judgment of the ones making the award after due consultation and deliberation.

[2] I take it that the appraisers as well as the umpire should be not only competent, but fair and unprejudiced as between the parties to the award and the determination of whose interests are confided to them. In the language of the policy of insurance, the appraiser is to be "disinterested," and this means "fair and unprejudiced." *Bradshaw vs. Insurance Co.*, 137 N. Y. 137, 32 N. E. 1055. It is the duty of the appraiser, undoubtedly, to bring out all the facts favorable to the party nominating him; but he is not the agent of the party so naming him. A refusal or willful neglect of the appraiser or umpire to listen to and consider material sworn statements presented is evidence of prejudice, bias, and interest. *Kaiser vs. Hamburg-Bremen Fire Ins. Co.*, 59 App. Div. 525, 69 N. Y. Supp. 344, affirmed 172 N. Y. 663, 65 N. E. 1118.

[3] And it was the duty of these appraisers to consult together, and, if they did not agree, to call in the umpire whose function it

was to deliberate with them. It was improper for one or two to consider evidence or information not submitted to the other or the others. New York Mut. Sav. Ass'n vs. Manchester Assur. Co., 94 App. Div. 104, 87 N. Y. Supp. 1075, where it is said:—

"The scheme of appraisal contemplates that the two appraisers shall estimate the amount of the loss, and in case of their disagreement 'their differences' shall be submitted to the umpire. It is not within the purpose of the provision that one appraiser shall present no estimate to his associate appraiser, but confer with the umpire in the absence of and without any notice whatever to the other appraiser."

[4] But this, substantially, is what was done here, and such action barely rose to the dignity of a real conference between Fleming and Nicholson. Each obtained information upon "his own hook," so to express it, and then each made figures based on his private information, to a large extent, and ignoring the other appraiser proceeded to make an award. Really Fleming was ignorant of the evidence or information on which Nicholson acted, and Nicholson was ignorant of that on which Fleming acted, and Stultz knew little if anything of the real information on which either or both of the others acted. This award was not the result of information furnished to all or considered by all or by any two, or of the joint deliberation of the three or of any two. True two signed the award, and so two agreed in the final result, but it by no means follows that the two would have agreed on that result had they consulted all the evidence and information possessed by each and deliberated thereon.

I think that an examination and consideration of the evidence of Mr. Fleming is conclusive against the fairness and justice of the award made. "Palmer's report" was the report of a gentleman engaged by the insurance companies, and this report was not accurate or based upon full information or correct information. Mr. Palmer was not sworn, and still Mr. Fleming on this trial testified as follows:—

"Q. Now, Mr. Fleming, in other words in making your appraisal of stock you gave full credit to Palmer's report and no credit whatever to the sworn proofs of loss and the affidavits presented by the company; that is the substance of it, is it? A. Yes, sir; you are correct."

This witness also said:—

"Q. Did you, while you were sitting as an appraiser on this case, did you ever hear of any figures made by Hollister or Lane on this plumbing? A. No, sir.

"Q. So that if the umpire had before him figures on plumbing made by Mr. Hollister and Mr. Lane he had information before him that you never saw upon the appraisal of this loss? A. That is true."

From reading the evidence of Mr. Fleming, it is apparent that he proceeded on the assumption from the very beginning that the quantities of material, etc., set forth in the proofs of loss were wrong, and that the company did not have the amount set forth in the proofs of loss. In short, he failed to give the sworn proofs of loss and the sworn affidavits submitted in support thereof any consideration whatever.

Without going into detail, the evidence also shows that on the prior trial of one of the cases against one of the insurance companies involved in this loss Mr. Fleming made statements almost exactly opposite to the statements made on the trial of this case in important matters. My impression is that he saw the force of the admissions made by him on that trial and sought to avoid their force and effect by changing his evidence on this trial. His explanation was that he did not understand the questions put to him on the former trial, but it seems to me clear that those questions were very plain and unmistakable, and that the answers were equally clear and emphatic. If it be true that Mr. Fleming was unable to understand and comprehend the questions put to him on the other trial, a fair inference may be drawn that he was incompetent to act as an appraiser in this important matter. The questions referred to were fair, clear, and explicit. It does not appear that the witness was confused or that he could have misunderstood.

My conclusions are that the appraisal made should be set aside, and that the whole matter should be determined before a court and jury.

There will be a judgment setting aside the award accordingly, with costs.



AACHEN & MUNICH FIRE INS. CO. *vs.* ARABIAN
TOILET GOODS CO.*
(Court of Appeals of Alabama.)

I. INSURANCE — FIRE INSURANCE — DEFENSES — MATTERS OF ABATEMENT.

The refusal of insured to submit to an examination under oath in accordance with the provisions of the policy does not forfeit or avoid the contract and bar recovery, but merely suspends the right of recovery until compliance; and hence the refusal is a matter of abatement only. (For other cases, see Insurance, Cent. Dig. §§ 1530, 1532-1534; Dec. Dig. § 615.)

* Decision rendered, Feb. 3, 1914. 64 South. Rep. 635.

2. PLEADING — ABATEMENT — WAIVER.

A plea to the merits, such as the general issue, is a waiver of defenses available in abatement; and hence, where an insurer filed a plea of the general issue, it could not rely on the refusal of insured to submit to an examination under oath concerning the loss, for that is a matter of abatement.

(For other cases, see *Pleading*, Cent. Dig. §§ 231-233; Dec. Dig. § 110.)

3. INSURANCE — ACTION ON FIRE POLICY — EVIDENCE — ADMISSIBILITY.

In an action on a fire policy, defendant's plea set up the conditions of the policy requiring proof of loss and submission to examination under oath, and alleged that no proof of loss had been furnished, and that insured refused to submit to examination. *Held* that, under this plea, evidence that an attorney representing another insurer, whose policy covered the same loss, with the knowledge of the agent of defendant, examined insured, professing to act as attorney for both companies, and prepared proofs of loss, which were accepted by defendant, was admissible.

(For other cases, see *Insurance*, Cent. Dig. §§ 1554, 1632-1644; Dec. Dig. § 645.)

4. INSURANCE — FIRE POLICIES — CONSTRUCTION — ARTICLES COVERED.

A fire policy on a stock of toilet articles, labels, machinery, bottles, and powder, as a matter of common knowledge, covers cornstarch.

(For other cases, see *Insurance*, Cent. Dig. §§ 339-346; Dec. Dig. § 163.)

5. INSURANCE — FIRE POLICIES — EVIDENCE.

In an action on a fire policy, where the insurer set up that insured had herself burned the property, evidence of the value of the property was admissible as shedding light on that question.

(For other cases, see *Insurance*, Cent. Dig. §§ 1554, 1632-1644; Dec. Dig. § 645.)

6. APPEAL AND ERROR — WITNESSES — DISCRETION OF COURT — CROSS-EXAMINATION — SCOPE.

The scope of the cross-examination of witnesses rests largely in the discretion of the trial court, and its action will not be interfered with, unless an abuse of discretion appears.

(For other cases, see *Appeal and Error*, Cent. Dig. §§ 3852-3857; Dec. Dig. § 971; *Witnesses*, Cent. Dig. §§ 923-930; Dec. Dig. § 267.)

7. INSURANCE—ESTOPPEL TO DENY AGENT'S AUTHORITY.

Where an attorney without authority prepared proofs of loss, which were accepted by an insurer, and, with the insurer's knowledge, examined insured under oath in accordance with a provision in the policy requiring such examination, the insurer, having acquiesced in the acts of the attorney and accepted the proof of loss prepared by him and the examination of insured which he made, is estopped to deny his authority.

(For other cases, see *Insurance*, Cent. Dig. §§ 1374-1377; Dec. § 556.)

Appeal from Circuit Court, Etowah County; J. E. Blackwood, Judge.
Action by the Arabian Toilet Goods Company against the Aachen & Munich Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hood & Murphree, of Gadsden, for Appellant.
Goodhue & Brindley, of Gadsden, for Appellee.

QUEEN OF ARKANSAS INS. CO. *vs.* MALONE.*

(Supreme Court of Arkansas.)

1. INSURANCE — PROOF OF LOSS — WAIVER.

The furnishing of proof of loss required by a policy was waived by the act of the adjuster denying all liability and refusing payment.

(For other cases, see Insurance, Cent. Dig. §§ 1391, 1392; Dec. Dig. § 559.)

2. INSURANCE — NONWAIVER — AGREEMENT — EFFECT AS TO WAIVER OF PROOF OF LOSS.

A nonwaiver agreement between insured and the adjuster, stipulating against waiver by the adjuster's action in investigating the cause of a fire, and ascertaining the amount of the loss, did not avoid the effect of a waiver of proof of loss by the adjuster's denial of any liability, since such denial was inconsistent with the further requirement to furnish proof of loss.

(For other cases, see Insurance, Cent. Dig. §§ 1391, 1392; Dec. Dig. § 559.)

3. INSURANCE — IRON-SAFE CLAUSE — SUBSTANTIAL COMPLIANCE.

Under the statute providing that only substantial compliance with the iron-safe clause is essential, it is sufficient, if a set of books is kept and preserved until after a fire from which the quantity and value of the lost or damaged property can be ascertained with reasonable certainty.

(For other cases, see Insurance, Cent. Dig. §§ 852, 853; Dec. Dig. § 335.)

4. INSURANCE—CONDITION OF POLICY—IRON-SAFE CLAUSE — SUBSTANTIAL COMPLIANCE.

In view of the statute making a substantial compliance with the iron-safe clause sufficient, the requirement in such clause that insured keep an account of cash sales was substantially complied with where he kept inventories of purchases, an account of credit sales and collections, deposited the cash received, and kept a bank account on his books, since such bank account afforded information as to cash receipts, and since a deduction of accounts against customers from the cash account would disclose the amount of cash sales.

(For other cases, see Insurance, Cent. Dig. §§ 852, 853; Dec. Dig. § 335.)

5. INSURANCE — ACTION ON POLICY — INSTRUCTIONS — IRON-SAFE CLAUSE.

In an action on a policy containing an iron-safe clause, instructions requiring a literal compliance with such clause, and ignoring the statute making a substantial compliance sufficient, were properly refused.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1771-1784; Dec. Dig. § 669.)

6. APPEAL AND ERROR—PARTY ENTITLED TO COMPLAIN—REQUEST FOR INSTRUCTIONS.

Where instructions as to the iron-safe clause were general, but the insurer failed to request specific instructions thereon, he could not complain on appeal that the instructions were too general.

(For other cases, see Appeal and Error, Dec. Dig. § 216.)

* Decision rendered, Feb. 2, 1914. 163 S. W. Rep. 771.

7. TRIAL—INSTRUCTIONS—SINGLING OUT FACT OR ISSUE.

In an action on an insurance policy, an instruction that plaintiff was thereby required to make an itemized inventory of stock within thirty days, and preserve it in an iron safe, to be produced, on request, after a loss, that plaintiff was required to show compliance therewith by a fair preponderance of the testimony, was not objectionable as singling the issue of failure to make such inventory, or as impressing on the jury that it was the only issue as to noncompliance with the iron-safe clause.

(For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.)

8. INSURANCE—POWERS OF AGENT—APPARENT AUTHORITY.

Where an insurance company held out its soliciting agent to insured as its agent, with general authority to do the things constituting an alleged waiver of the iron-safe clause, it was bound by his acts, notwithstanding the fact that they may have been beyond the actual scope of his authority.

(For other cases, see Insurance, Cent. Dig. §§ 948-951, 956-965; Dec. Dig. § 375.)

9. PRINCIPAL AND AGENT—“AGENT.”

The word “agent” is broad in its signification, and may mean either a general agent or one with special or limited authority.

(For other cases, see Principal and Agent, Cent. Dig. §§ 245, 246, 250-253, 592; Dec. Dig. § 92.)

(For other definitions, see Words and Phrases, vol. 1, pp. 262-270; vol. 8, p. 7569.)

10. PRINCIPAL AND AGENT—POWERS OF AGENT—EXTENT OF AUTHORITY.

Where an agency exists, those who deal with the agent must ascertain the extent of his authority.

(For other cases, see Principal and Agent, Cent. Dig. §§ 245, 246, 250-253, 592; Dec. Dig. § 92.)

11. INSURANCE—ACTION ON POLICY—QUESTION FOR JURY—SUFFICIENCY OF EVIDENCE—POWERS OF AGENT.

In an action on a policy, evidence held to warrant a finding that the insurer's soliciting agent was held out as apparently authorized to act for the company as to explaining and accepting compliance with the iron-safe clause.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

12. INSURANCE—IRON-SAFE CLAUSE—WAIVER.

The conduct of insurer's agent held out as authorized in inducing the insurer to retain a policy containing an iron-safe clause, and rely on its security, operated as a waiver of prior omissions known to him with respect to insured's methods of keeping books.

(For other cases, see Insurance, Cent. Dig. §§ 1026, 1027, 1030, 1035, 1040, 1057; Dec. Dig. § 388.)

Hart, J., dissenting.

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.
Action by Theodore Malone against the Queen of Arkansas Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Manning, Emerson & Morris, of Little Rock, for Appellant.
John B. Moore, of Clarendon, for Appellee.

KELLEY vs. PEOPLE'S NAT. FIRE INS. CO.*

(Supreme Court of Illinois.)

1. INSURANCE—FIRE INSURANCE—CONDITIONS.

A fire policy on mortgaged property provided that it should be void if the insured should procure any other insurance, and that the insurer should not be liable for a greater proportion of any loss than the amount the policy should bear to the whole insurance on the property. The mortgages on the property required the mortgagor to insure the property for the benefit of the mortgagee, and upon her failure, authorized the mortgagee to procure insurance. The mortgagee procured insurance, though the mortgagor had obtained the policy in question, but, upon being informed of that fact, promised to cancel his policy. *Held*, that the existence of the policy procured by the mortgagee must be disregarded, and did not avoid the one procured by the mortgagor, and hence there could be no contribution between the two insurers.

(For other cases, see Insurance, Cent. Dig. §§ 856-873; Dec. Dig. § 336.)

2. INSURANCE—FIRE INSURANCE—WAIVER OF BREACH OF CONDITIONS.

Where a fire policy provided that it should become void if, with the knowledge of the insured, foreclosure proceedings should be commenced, the insurer waived a breach of the condition where, upon notice of the commencement of foreclosure proceedings, it neglected to cancel the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1037, 1038; Dec. Dig. § 390.)

3. INSURANCE—AVOIDANCE—CHANGE OF TITLE—EFFECT OF JUDGMENT.

The mere rendition of a judgment against the owner of property does not transfer title, although it may create a lien; and hence the rendition of a judgment against the owner of insured property does avoid the policy, under a condition providing that it should be void if any change should take place in the interest, title, or possession of the insured.

(For other cases, see Insurance, Cent. Dig. §§ 794-822, 825; Dec. Dig. § 328.)

4. INSURANCE—ACTIONS—EVIDENCE.

In an action on a fire policy, an assessor's schedule giving the valuation of the insured property is not admissible on the question of value, where it did not appear that the insured made any return of her property for assessment that year, or that the schedule was prepared by her agent.

(For other cases, see Insurance, Cent. Dig. § 1695; Dec. Dig. § 660.)

Error to Appellate Court, Third District, on Appeal from Circuit Court, McLean County; Colostin D. Myers, Judge.

Action by Emma Kelley to the use of J. Y. Chisholm against the People's National Fire Insurance Company. A judgment for plaintiff was affirmed by the Appellate Court (181 Ill. App. 142), and defendant brings certiorari. Affirmed.

* Decision rendered, Feb. 21, 1914. 104 N. E. Rep. 188.

Frederick A. Brown and William R. T. Ewen, Jr., both of Chicago (Raymond S. Pruitt, of counsel), for Plaintiff in Error.

Leslie J. Owen, of Le Roy, and Fitz Henry & Martin, of Bloomington, for Defendant in Error.



ROBINSON *vs.* MENNONITE MUT. FIRE INS. CO.*

(Supreme Court of Kansas.)

1. INSURANCE—POLICY—CONSTRUCTION.

The condition of a fire insurance policy, that if the insured building become and remain vacant for a period of thirty days the policy shall be void unless notice be given and a vacancy permit be issued, should be interpreted with reference to its manifest purpose. It contemplates the protection of a guardian of the premises, some individual in charge of them who exercises a preserving superintendency over them, and gives them such care and attention as will naturally result in protection against the hazard covered by the policy.

(For other cases, see Insurance, Cent. Dig. §§ 764-779; Dec. Dig. § 323.)

2. INSURANCE—POLICY—"VACANT" BUILDING.

Within the rule stated, a dwelling house may not be vacant although not actually occupied as a present place of abode, and such a dwelling house may be vacant although it may be far from being empty of everything but air.

(For other cases, see Insurance, Cent. Dig. §§ 764-779; Dec. Dig. § 323.)

(For other definitions, see Words and Phrases, vol. 8, pp. 7254-7264, 7826.)

3. INSURANCE — ACTION ON POLICY — VACANT BUILDING — SUFFICIENCY OF EVIDENCE.

The evidence considered, and *held*, that a farm dwelling house and barn were not vacant, although no one slept in the house at night and meals were eaten there only occasionally.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

Porter, J. dissenting.

Appeal from District Court, Woodson County.

Action by George W. Robinson against the Mennonite Mutual Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. C. Culver, of Yates Center, and Allen & Allen, of Topeka, for Appellant.

Lamb & Hogeland, of Yates Center, for Appellee.

* Decision rendered, March 7, 1914. 139 Pac. Rep. 420. Syllabus by the Court.

FIREMAN'S FUND INS. CO. OF SAN FRANCISCO, CAL.,
*vs. SEARCY ET AL.**

(Court of Appeals of Kentucky.)

1. INSURANCE—FIRE INSURANCE—AUTHORITY OF AGENT.
 An insurance agent having authority to solicit insurance, settle the terms of insurance, and to issue and renew policies, has authority to make a preliminary parol contract to issue or renew a policy about to expire.
 (For other cases, see Insurance, Cent. Dig. §§ 203-209; Dec. Dig. § 131.)

2. INSURANCE—ACTION—SUFFICIENCY OF EVIDENCE.
 Evidence, in an action on a fire policy, *held* to sustain a finding that defendant's agent agreed to renew the policy.
 (For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

3. APPEAL AND ERROR — FINDINGS — CONCLUSIVENESS — EVIDENCE.

The jury's finding on a question of fact will not be interfered with merely because it is not supported by as much evidence as there was against it.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.)

Appeal from Circuit Court, Woodford County.

Action by James Searcy and others against the Fireman's Fund Insurance Company of San Francisco, Cal. From a judgment for plaintiffs, defendant appeals. Affirmed.

Wallace & Harriss, of Versailles, and Flexner & Gordon, of Louisville, for Appellant.

Field McLeod and Alfred H. Nuckols, both of Versailles, for Appellees.

* Decision rendered, March 6, 1914. 163 S. W. Rep. 1103.



FIDELITY INS. CO. ET AL. *vs.* ATLANTIC COAST LINE R. CO.*

(Supreme Court of North Carolina.)

1. INSURANCE—LOSS TO INSURED—SUBROGATION.

Where an insurer who has paid a loss to the insured is subrogated to the rights of the latter as against tort-feasors responsible for the destruction of the insured property, the insured's right of subrogation is limited by the rights of the insured against the tort-feasor, there being

* Decision rendered, March 11, 1914. 80 S. E. Rep. 1069.

no privity or legal relation between the insurer and the tort-feasor, so that every right the insurer can acquire must come through the insured, and is subject to every defense and limitation which could be interposed against him.

(For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.)

2. INSURANCE—PAYMENT OF LOSS—NEGLIGENT FIRE—RECOVERY BY INSURER.

Where an insurer has paid a loss caused by fire set out by the negligence of a railroad company, and the owner thereafter collects damages from the railroad company, the insurer cannot maintain an action against the railroad company to compel it to make good its loss.

(For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.)

3. INSURANCE—PAYMENT OF LOSS—SUBROGATION OF INSURER—LIMITATIONS.

Where an insurance company paid a loss on property destroyed by the alleged negligence of a railroad company, its right of subrogation to the owner's cause of action against the railroad company accrued, for the purpose of determining the bar of limitations at the time of the loss, and not at the time of the payment of the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.)

4. INSURANCE — INSURED PROPERTY — DESTRUCTION — PAYMENT OF LOSS BY TORT-FEASORS—FRAUD.

Where a railroad company paid for the destruction of insured property only at the end of a lawsuit wherein judgment had been pronounced against it in favor of the insured, such payment was not in fraud of the insurer, even though it had paid the loss under the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.)

Appeal from Superior Court, Wayne County; Daniels, Judge.

Action by the Fidelity Insurance Company and the Piedmont Fire Insurance Company against the Atlantic Coast Line Railroad Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Geo. B. Elliott, of Wilmington, and O. H. Guion, of New Bern, for Appellant.

Langston & Allen and Dortch & Barham, all of Goldsboro, for Appellees.

DORMAN *vs.* CONNECTICUT FIRE INS. CO.*

(Supreme Court of Oklahoma.)

1. INSURANCE — CONTRACT — AUTHORITY OF SOLICITING AGENT.

Ordinarily, a traveling soliciting agent, without actual authority to contract, who is furnished by his principal, an insurance company, with no indicia of authority other than printed blank forms of application for insurance, addressed to it, which either negative the idea of authority to contract, or, as in the present case, is signed by the applicant without actual knowledge of its contents, does not have the apparent authority to enter into a contract of insurance.

(a) Quare, where such forms, within the actual knowledge of the applicant, are free from specific limitation upon the authority of such agent, does he thus have the apparent authority to bind such principal, as inducement to the making of such application, by a temporary contract of insurance, until such principal may reject such application?

(For other cases, see Insurance, Cent. Dig. §§ 180-182, 1849, 1850; Dec. Dig. § 129.)

2. INSURANCE—"CONTRACT OF INSURANCE"—ESSENTIALS.

There is no contract of insurance unless the minds of the parties have met in agreement as to (a) the subject-matter, (b) the risk insured against, (c) the period of risk, (d) the amount of insurance, and (e) the premium.

(For other cases, see Insurance, Cent. Dig. §§ 195-202; Dec. Dig. § 130.)

(For other definitions, see Words and Phrases, vol. 2, p. 1531.)

3. INSURANCE—CONTRACT—UNACCEPTED APPLICATION.

An unaccepted application for insurance accompanied by the premium, although retained without notice of objection for five days after its date and until the applicant has suffered the loss against which he desired the insurance, is not a contract of insurance.

(For other cases, see Insurance, Cent. Dig. §§ 195-202; Dec. Dig. § 130.)

4. INSURANCE—CONTRACT—IMPLIED ACCEPTANCE OF APPLICATION.

Acceptance of an application may ordinarily be inferred from the retention and application of the premium; but, when there is evidence reasonably tending to show that there was no such acceptance in fact, the law does not imply acceptance from such retention; and the adverse finding and judgment in the trial court is conclusive against appellant's claim of acceptance.

(For other cases, see Insurance, Cent. Dig. §§ 195-202; Dec. Dig. § 130.)

Commissioners' Opinion, Division No. 1. Error from District Court, Grant County; W. M. Boles, Judge.

* Decision rendered, Feb. 28, 1914. 139 Pac. Rep. 262. Syllabus by the Court.

**WARD vs. QUEEN CITY FIRE INS. CO. OF SIOUX FALLS,
S. D.***

(Supreme Court of Oregon.)

1. INSURANCE—FORFEITURE—FRAUD OR FALSE SWEARING.

Policies of insurance become void in case of fraud or false swearing by the insured as to any matter relating to the insurance or the subject thereof, whether before or after loss, but only when it is done willfully and knowingly, with the effect of defrauding the insurer.

(For other cases, see Insurance, Cent. Dig. §§ 1362-1366; Dec. Dig. § 553.)

2. INSURANCE—FORFEITURE—WAIVER.

Where an insurer denies liability upon a specific ground, other grounds of forfeiture at the time within the insurer's knowledge, including false swearing by the insured, are waived, if the insured has taken action pursuant to the attitude taken by the insurer.

(For other cases, see Insurance, Cent. Dig. § 1036; Dec. Dig. § 395.)

3. INSURANCE — ACTIONS — “PRESUMPTION” — NATURE AND EFFECT.

Under L. O. L. § 795, defining a presumption as a deduction which the law expressly directs to be made from particular facts, and section 93, naming presumptions as a species of evidence, the presumption in an action on an insurance policy that the insured is innocent of false swearing is evidence to be submitted to the jury.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.)

(For other definitions, see Words and Phrases. vol. 6, pp. 5535-5537; vol. 8, pp. 7761, 7762.)

4. APPEAL AND ERROR — REVIEW — DISCRETION OF TRIAL COURT—ADMISSION OF EVIDENCE.

In an action on an insurance policy, the discretion of the trial court in admitting opinion evidence, as to the value of merchandise insured, of a witness who had kept books for insured and assisted the adjusters in their work, and a witness who had considerable experience in buying goods of the kind carried by plaintiff and who was a frequent visitor at the insured's place of business and acquainted with the quantity and character of his stock of goods, will not be disturbed on appeal.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. § 970.)

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by E. M. Ward against the Queen City Fire Insurance Company of Sioux Falls, South Dakota. From a judgment for plaintiff, defendant appeals. Affirmed.

S. C. Spencer, of Portland (Wilbur, Spencer & Dibble, of Portland, and U. S. G. Cherry, of Sioux Falls, S. D., on the brief), for Appellant.

Dan J. Malarkey, of Portland (Malarkey, Seabrook & Stott, of Portland, on the brief), for Respondent.

* Decision rendered, Feb. 17, 1914. 138 Pac. Rep. 1067.

RIDDELL vs. ROCHESTER-GERMAN INS. CO. OF NEW YORK.*

(Supreme Court of Rhode Island.)

1. ESTOPPEL—ESTOPPEL BY CONDUCT.

An estoppel in pais usually arises from the misrepresentation or concealment of material facts and is based upon the idea that it would be a fraud to permit the party estopped to assert what his conduct had denied after his denial had been acted upon in good faith.

(For other cases, see Estoppel, Cent. Dig. §§ 121-125, 127; Dec. Dig. § 52.)

2. INSURANCE—ARBITRATION OF LOSS—AWARD.

The award of appraisers, selected under a fire policy to determine the amount of loss, must conform in substance and form to the agreement for submission to appraisers.

(For other cases, see Insurance, Cent. Dig. §§ 1430-1432, 1434; Dec. Dig. § 574.)

3. INSURANCE—AMOUNT OF LOSS—“AWARD.”

An agreement in a fire policy to submit the amount of loss to appraisers contemplates the making of an appraisement and also of an “award,” which is the finding or judgment based upon the appraisement.

(For other cases, see Insurance, Cent. Dig. §§ 1420, 1421; Dec. Dig. § 567.)

(For other definitions, see Words and Phrases, vol. 1, pp. 656, 657.)

4. INSURANCE — FIRE INSURANCE — ACTIONS — SUFFICIENCY OF EVIDENCE.

In an action on a fire policy, which provided for the submission of the amount of loss to appraisers upon disagreement, evidence held not to sustain a finding that the presentation by defendant of the form of award to be used was intended or calculated to mislead insured or the appraisers to believe that an itemized award was not required so as to estop defendant from insisting on such award.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

5. INSURANCE — FIRE INSURANCE — APPRAISEMENT AND AWARD.

Where the award of appraisers as to the amount of loss is invalid, it is the duty of insured, and not of the insurer, to take further steps to procure a new award, especially where the policy required the amount of loss to be determined by appraisement and award in case of disagreement before an action could be maintained on the policy.

(For other cases, see Insurance, Cent. Dig. § 1435; Dec. Dig. § 575.)

6. APPEAL AND ERROR—HARMLESS ERROR.

Since the insurance company was not required to take steps to procure a new award as to the amount of damage, upon failure of the first award and appraisement for not giving an itemized list of the property damaged, etc., the exclusion of evidence as to its failure to ask for a new appraisement was harmless in an action on the policy.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.)

* Decision rendered, March 13, 1914. 89 Atl. Rep. 833.

7. INSURANCE—FIRE INSURANCE—RIGHTS OF MORTGAGEE—“THE INSURED.”

A fire policy provided that the loss should be payable to plaintiff as mortgagee, as his interest may appear, and the insurance, as to the interest of the mortgagee only, is not invalidated by any act or neglect of the mortgagor or owner or by any proceeding relating to the property, provided that, if mortgagor neglect to pay any premium, mortgagee shall pay the same. The policy required “the insured” to make proofs of loss. *Held*, that where mortgagee had no knowledge of the failure to procure a valid arbitration of the amount of loss, as required by the policy, or of the mortgagor’s failure to procure a new appraisal and award upon failure of the first award, because it did not contain an itemized list of the property damaged, the neglect of the mortgagor to procure such award would not prevent mortgagee from maintaining an action on the policy; the words “the insured” referring to the mortgagor.

(For other cases, see Insurance, Cent. Dig. §§ 1520-1528; Dec. Dig. § 612.)

(For other definitions, see Words and Phrases, vol. 4, p. 3681.)

8. INSURANCE—FIRE INSURANCE—ACTION—ADMISSION OF EVIDENCE.

An award of appraisers which was invalid was properly excluded from evidence in an action on a fire policy, whether offered to show performance of the condition requiring an award or to establish the amount of loss, or for both purposes.

(For other cases, see Insurance, Cent. Dig. §§ 1697, 1698, 1700-1706; Dec. Dig. § 662.)

Exceptions from Superior Court, Providence and Bristol Counties; John Doran, Judge.

Action by Hugo Riddell against the Rochester-German Insurance Company. Verdict for defendant and plaintiff excepts. Exception sustained, and case remitted for new trial.

See, also, 35 R. I. 45, 85 Atl. 273.

Arthur Cushing, William F. Carroll, and James F. McCartin, all of Providence, for Plaintiff.

C. M. Van Slyck and Frederick A. Jones, both of Providence, for Defendant.

**CAMDEN FIRE INS. ASS'N OF CAMDEN, N. J. vs. PUETT.***

(Court of Civil Appeals of Texas. Ft. Worth.)

I. APPEAL AND ERROR—REVIEW—HARMLESS ERROR.

In an action upon an insurance policy defendant was not prejudiced by the action of the court in refusing it a continuance to procure the testimony of a witness to prove a fact which the insured on the stand admitted.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4115-4121; Dec. Dig. § 1043.)

* Decision rendered, Jan. 10, 1914. Rehearing denied, Feb. 14, 1914. 164 S. W. Rep. 418.

4. INSURANCE—FIRE INSURANCE—“OCCUPY.”

The term “occupied,” as used in a fire policy, implies an actual use by some person according to the purpose for which it is designed, and does not imply that some one shall remain in the building all of the time without interruption, but merely that there shall not be a cessation of occupancy for any considerable length of time.

(For other cases, see *Insurance*, Cent. Dig. §§ 764-779; Dec. Dig. § 323.)
(For other definitions, see *Words and Phrases*, vol. 6, pp. 4909, 4910.)

5. INSURANCE—FIRE INSURANCE—OCCUPATION OF BUILDING.

A sanitarium which consisted of some twenty-two rooms and several cottages cannot be said to have been “occupied” during the months preceding the fire, where during that time there was no attending physician, matron, or servants, and no facilities for heating the building, which then only contained three people, who were not authorized to receive patients or work for them, and who left about twenty-six hours before the fire, after which the building was in charge of a watchman.

(For other cases, see *Insurance*, Cent. Dig. §§ 764-779; Dec. Dig. § 323.)

6. INSURANCE—SUBROGATION OF MORTGAGEE.

The rights of a lienholder and of the insurance companies under a provision in a fire policy that, whenever the company shall pay the mortgagee for any loss, and claim that no liability existed toward insured, the company should be subrogated to the rights of the party receiving payment, were not affected by the payment of premiums by the mortgagor.

(For other cases, see *Insurance*, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 66.)

7. INSURANCE—SUBROGATION OF MORTGAGEE.

Where the parties to a fire policy understood that a provision that, whenever the company paid the “mortgagee” any sum for loss and claimed that, as to the mortgagor or owner, no liability existed, the company should be subrogated to the rights of the party receiving payment as to all collateral securities was intended to cover a mechanic’s lien on the premises, the insurance company, upon paying such lienor’s claim, became subrogated to her rights as against the mortgagor.

(For other cases, see *Insurance*, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 66.)

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by R. S. Cobb against the Washington Fire Insurance Company and others, in which defendants filed a cross-bill impleading others. From a judgment for plaintiff, defendant named and others appeal. Affirmed as to two impleaded defendants, and reversed and remanded as to the other defendants.

Templeton, Brooks, Napier & Ogden, of San Antonio, and Crane & Crane, of Dallas, for Appellants.

A. L. Matlock and Butler L. Knight, both of San Antonio, for Appellees.

ST. PAUL FIRE & MARINE INS. CO. *vs.* PECK.*
(Supreme Court of Oklahoma.)

1. COURTS—JURISDICTION—AMOUNT INVOLVED.

Section 2, art. I, c. 27, Sess. Laws 1907-8, and § 10, art. 7, Const. Okl., confer jurisdiction upon the district court to try an action for the recovery of \$500 on an insurance policy, with interest in the sum of \$43.

(For other cases, see Courts, Cent. Dig. §§ 413-425, 428-436, 443, 456, 458, 465; Dec. Dig. § 169.)

2. APPEAL AND ERROR—JURISDICTION—RIGHT TO RECALL MANDATE.

When, by mistake or inadvertence, an order, judgment, or decision of this court is improvidently made as to the statute defining the jurisdiction of the trial court, although the mandate is transmitted to the trial court and by it recorded, this court does not lose jurisdiction of the cause and may recall the same when the court's attention is called to such mistake.

(For other cases, see Appeal and Error, Cent. Dig. § 4719; Dec. Dig. § 1218.)

3. INSURANCE — CANCELLATION OF POLICY — CONDITIONS PRECEDENT—RETURN OF PREMIUM.

Where an insurance policy provides that “* * * this entire policy shall be void at the election of the company if, without the consent of the secretary or general agent of the company indorsed thereon, * * * the property insured or any part thereof be or become incumbered by lien, mortgage, or otherwise, * * *” and the further provisions that “* * * this policy may be canceled by either party. If upon the request of the company by returning to the insured the pro rata unearned premium * * * and giving notice to the insured, * * *”—and where insured mortgages the property without the consent of the company, the insurer cannot elect to declare the policy void without returning or offering to return to insured the pro rata unearned premium.

(For other cases, see Insurance, Cent. Dig. §§ 509-512; Dec. Dig. § 230.)

4. APPEAL AND ERROR—FINDINGS—EVIDENCE.

The rule in this court is that, where the evidence reasonably tends to support the findings of a jury, this court will not review the same.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.)

5. INSURANCE—ACTION ON POLICY—ATTORNEY'S FEE.

In the absence of statute or conditions in policy authorizing the taxing of attorney's fee, the same cannot be recovered in an action by insured on such policy.

(For other cases, see Insurance, Cent. Dig. §§ 1805, 1806; Dec. Dig. § 675.)

On rehearing. Mandate recalled, and judgment of the trial court for plaintiff, S. E. Peck, affirmed.

For former opinion, see 130 Pac. 805.

* Decision rendered, Feb. 17, 1914. 139 Pac. Rep. 117.

MARINE.**UNITED STATES DISTRICT COURT.**

W. D. WASHINGTON, N. D.

PACIFIC CREOSOTING CO.

vs.

THAMES & MERSEY MARINE INS. CO., LIMITED.*

1. INSURANCE — MARINE INSURANCE — CONSTRUCTION OF POLICY — WARRANTY AGAINST PARTICULAR AVERAGE — "ON FIRE" — "BURNED."

A clause in a marine policy on cargo, "warranted free from particular average unless the vessel or craft or the interest insured be stranded, sunk or on fire," is not to be construed as equivalent to the older form in which the word "burned" was used instead of "on fire," and, in the light of the rule that such contracts are to be construed most favorably to the insured if some structural part of the vessel was actually on fire, it is sufficient to open the warranty clause.

(For other cases, see Insurance, Cent. Dig. §§ 1230-1238; Dec. Dig. § 478.)

2. INSURANCE—ACTION ON MARINE POLICY—DEFENSES.

To an action on a marine policy on cargo which covered "the risk of craft and/or raft to and from the vessel," it is not a defense that a lighter employed to land the cargo, on which a loss occurred, was not seaworthy.

(For other cases, see Insurance, Cent. Dig. § 1111; Dec. Dig. § 415.)

3. INSURANCE—RISKS AND CAUSE OF LOSS—MARINE POLICY.

There is no implied warranty in a policy on cargo that the goods are seaworthy for the voyage, and, where the vessel was seaworthy when the voyage commenced and the cargo was in good condition when received, the insurer is liable for a loss during the voyage from external causes.

(For other cases, see Insurance, Cent. Dig. §§ 1088-1090, 1093, 1103-1105; Dec. Dig. § 402.)

In Admiralty. Suit by the Pacific Creosoting Company against the Thames & Mersey Marine Insurance Company, Limited. Decree for libelant.

See, also, 184 Fed. 947.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for Libelant.
Brady & Rummens, of Seattle, Wash., for Claimant.

NETERER, D. J.

This action is founded on a marine policy insuring a cargo, 2,753 drums of creosote oil in the British ship "Sardhana," shipped from London, England, to Eagle Harbor in Puget Sound.

* Decision rendered, Jan. 1914. 210 Fed. Rep. 958.

Wash., "including the risk of craft, and/or raft to and from the vessel." There is also incorporated in the policy by attaching to the margin a printed slip, which is not a part of the printed form, the following:—

"Warranted free from particular average, unless the vessel or craft or the interest insured be stranded, sunk or on fire. * * *"

General average and salvage charges payable according to foreign statement or York-Antwerp rules, or 1890 rules, if in accordance with the contract of affreightment. Including all risks of craft and boats, "including all risks of transshipment and of craft, lighterage and/or any other conveyances * * * from the vessel until safely delivered in the warehouse. * * *" In the body of the printed form of the policy:—

"It is declared and agreed that corn, fish, salt, and fruit, flour and seed are warranted free from average unless general or the ship be stranded, sunk or burnt."

It is alleged that by reason of storms encountered on the voyage the cargo was battered and damage resulted by loss of creosote oil, and after arriving at the port of discharge a gale caused the barge used for lightering the cargo to capsize, and thereby four drums were lost and a large salvage expense incurred. On November 18th, a fire broke out in the after 'tween decks of the ship while lying in the port of Oak Harbor, behind the bulkhead forward of the lazarette. The following was entered in the log of the ship, and is sustained by the evidence:—

"November 18. Stevedores continued to discharge the cargo and at 5 p. m. finished for the day. 291 further drums were discharged. About 9:30 p. m. smoke was discovered issuing from the after hatch, by one of the crew, who immediately notified the master and then gave the alarm. This alarm was responded to by the crews of the ship Jupiter, the S.S. Hornelen, and the employees of the Pacific Creosoting Company, who brought with them several chemical fire extinguishers. The master went below through the lazarette and saw the reflection of the fire over the top of the bulkhead between the after 'tween decks and the lazarette. The after 'tween decks were still full of cargo. After considerable trouble the fire was extinguished, and it was then discovered that the aforesaid bulkhead, together with the door thereof (the bulkhead was built in the vessel), and the dunnage in the after 'tween decks, were burned, and some of the ship's stores in the lazarette were damaged by water and chemicals. The origin of the fire was not discovered."

[1] The respondent claims exemption from liability on account of the "free from particular average" warranty; that the "Sardhana" was not "on fire"; that no recovery for the four drums lost on the lighter or for the salvage expenses can be had, because the lighter in question was unseaworthy; that no re-

covery can be had in any event, it not being shown that any creosote was lost; and that, if lost, it was not on the ship at the time of the fire, and the "F. P. A." clause does not apply; and that it is not shown what loss occurred because of the perils insured against.

It is strenuously urged that the fire was not sufficient to delete the "F. P. A." warranty, and reliance is placed on the *Glenlivet*, Prob. p. 48, decided in 1893, and cited by the Supreme Court of the United States in *London Assurance vs. Companhia, etc.*, 167 U. S. 149, 156, 17 Sup. Ct. 785, 42 L. Ed. 113. In the form of policy previous to the *Glenlivet* Case, the word "burned" was used in the "F. P. A." clause. After this case was decided the words "on fire" were substituted for the word "burned." No case has been suggested where the words "on fire" have ever been before the courts in the same relation in any other case. The change of the words must have been made for a purpose. These words as stated by Judge Hanford in passing upon the exceptions to the libel in this case in (D. C.) 184 Fed. 949, are not synonymous. The policy sued on in the body thereof with relation to "corn," etc., uses the terms sunk or "burned" and in the margin with relation to the cargo especially provides sunk or "on fire," clearly evidencing a purpose in the minds of the parties to distinguish from the former term and construction. The testimony of Mr. Beckett, an average adjuster of London, England, shows that, "under clauses * * * containing the words 'on fire,' it is the practice of the adjusters in England to consider the warranty open if some structural part of the vessel has been actually on fire." It is clear that "on fire" used in the policy was not to be considered as was "burned" in the *Glenlivet* case. The warranty is drawn in the nature of an exception to the liability of the insurer and is strictly construed against him. Judge Morrow, Circuit Judge, in *Canton Ins. Offices vs. Woodside*, 90 Fed. 301, 305, 33 C. C. A. 63, 68, said:—

"In the case at bar the intention of the parties is not expressed as clearly as it might be, and hence any doubt that there may be is to be resolved in favor of the insured and against the insurer. A policy of insurance is a contract of indemnity, and is to be liberally construed in favor of the insured. *Yeaton vs. Fry*, 5 Cranch, 335 [3 L. Ed. 117]; *National Bank vs. Insurance Co.*, 95 U. S. 673, 679 [24 L. Ed. 563]; *Steel vs. Insurance Co.*, 2 C. C. A. 463, 51 Fed. 715, 723, and cases there cited; 1 Arn. Ins. (6th Ed.) § 295. If the policy will fairly admit of two constructions, that one should be adopted which will indemnify the insured."

"The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid con-

tract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself." *National Bank vs. Insurance Co.*, 95 U. S. 673, 24 L. Ed. 563.

"If the company by the use of the expressions found in the policy leaves it a matter of doubt as to the true construction to be given to the language, the court should lean against the construction which would limit the liability of the company." *London Assurance vs. Companhia, etc.*, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113.

The fire, as shown by the evidence, was on some structural part of the ship, and endangered the ship by actually burning some part of it, and this was sufficient to open the warranty clause.

[2] The contention that the lighter in question was unseaworthy cannot be sustained. The provisions of the policy include "the risk of craft and/or raft to and from the vessel."

"The warrant of seaworthiness which is implied as to the ship does not extend to lighters employed to land the cargo." *Arnold on Marine Insurance* (8th Ed.) § 689; 19 Am. & Eng. Encyc. of Law (2d Ed.) 1002; 25 Cyc. 645; *Lane vs. Nickerson*, L. R. 1 C. P. 412.

The burden to show unseaworthiness, if that were material, is upon the respondents. *Nome Beach, etc., vs. Munich Assurance Co.* (C. C.) 123 Fed. 820. There is no testimony before the court to establish such condition.

[3] The bill of lading or shipping receipt for the cargo recites:—

"Shipped in good order and well-conditioned by Blagden, Waugh & Company, in and upon the good ship called the *Sardhana* * * * 2,753 drums of creosote oil."

The captain of the ship was asked:—

"Was not all of the cargo in apparent good order and condition when received on said ship? Yes, I rejected what we considered bad drums."

The ship's log recites, and these facts are in evidence:—

"Sept. 26: It was noticed that by the soundings in the pump well that there was an increase of liquid which appeared to be mostly creosote."

"Nov. 3. Similar conditions were encountered, and the cargo again worked badly."

The witness Wylie testified:—

"The creosote escaped into the hold of the vessel partly on account of the severe weather and partly on account of the original weakness of the drums, and the leakage of creosote was to some extent due to the screw bungs working out."

On the arrival of the ship at its port of discharge, it was found that there had been lost during the voyage the difference

between the cargo received and that delivered, which is claimed in the libel.

"There is no implied warranty in a policy on goods that the goods are seaworthy for the voyage." 2 Arnold on Marine Insurance (8th Ed.) § 689.

The ship "Sardhana" being seaworthy when she left London, the cargo in good order and condition when received on the ship, the damage to the drums being external, and it conclusively appearing that there was a loss of cargo, the libellant is entitled to recover his damage. The Peter der Grosse, L. R. 1 P. D. 414; Nome Beach, etc., vs. Munich Insurance Co. (C. C.) 123 Fed. 827.

Under the terms of the policy, and the warranty being open by reason of the ship being "on fire," the respondents are liable for the total damage claimed. 26 Cyc. 682; London Assurance Co. vs. Companhia, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113; 1 Cyc. 884A; Thames & Mersey Marine Ins. Co. vs. Pitts, 7 Aspinwall's Maritime Cases (N. S.) 302.

A decree may be entered accordingly.



CALIFORNIA RECLAMATION CO. *vs.* NEW ZEALAND INS. CO. (Civ. 1,187.)*

(District Court of Appeal, First District, California.)

1. EVIDENCE—PAROL EVIDENCE—INTENT—MARINE INSURANCE—CONTRACTS.

Where a marine policy specifically insured a dredge in tow of a sea tug on a given journey, and was silent as to any barges which might accompany the dredge, oral evidence is admissible to show whether it was understood the barges were to accompany the dredge; the contract itself being silent.

(For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.)

2. INSURANCE—MARINE POLICIES.

While Civ. Code, § 2562, declares that a concealment entitles the injured party to rescind a contract of insurance, rescission is not the exclusive remedy of an insurer who has written a policy in favor of one who concealed a matter affecting the risk; but the insurer may seek affirmative relief in a court of equity for any injury sustained by the wrongful act, or may set up fraud by way of defense to an action on the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1530, 1532-1534; Dec. Dig. § 615.)

3. INSURANCE—MARINE INSURANCE—MATTERS MATERIAL TO THE RISK.

Where a dredge to be towed from San Francisco to Los Angeles in mid-

* Decision rendered, Dec. 30, 1913. Rehearing denied, by Supreme Court Feb. 27, 1914. 138 Pac. Rep. 960.

winter was insured, the fact that barges were to be towed behind the dredge, increasing the length of the tow nearly three times, is a material question affecting the risk.

(For other cases, see Insurance, Cent. Dig. § 710; Dec. Dig. § 313.)

4. INSURANCE—MARINE INSURANCE—DEFENSES.

In an action on a marine policy, the insured has the right to rely on the presumption that the policy received was in accordance with the facts disclosed in his application to the broker, and his failure to read the policy which did not contain matters material to the risk that were stated in the application will not relieve the insurer, whose duty it would be to make the policy conform to the facts stated.

(For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.)

5. INSURANCE — MARINE INSURANCE — LIABILITY OF INSURER.

Plaintiff engaged a firm of insurance brokers to secure insurance upon a dredge which was being towed from San Francisco to Los Angeles. These brokers applied to H. & Co., general agents dealing in marine insurance, for policies covering the risk. H. & Co., being unwilling to place the entire risk with the company which they represented, in accordance with the custom of the trade, placed part of the risk with a broker acting for the defendant insurer. The questions material to the risk were disclosed to H. & Co. *Held*, that H. & Co. became defendant's agents, and a concealment made by them will not avoid the policy.

(For other cases, see Insurance, Cent. Dig. § 552; Dec. Dig. § 259.)

Appeal from Superior Court, city and county of San Francisco; John Hunt, Judge.

Action by the California Reclamation Company against the New Zealand Insurance Company. From a judgment for plaintiff, and an order denying defendant's motion for new trial, it appeals. Affirmed.

Andros & Hengstler, of San Francisco, for Appellant.
Ira S. Lillick, of San Francisco, for Respondent.

ACCIDENT AND HEALTH.**SUPREME COURT OF MINNESOTA.**

MATHER ET AL.

vs.

LONDON GUARANTEE & ACCIDENT CO., LIMITED.*

1. INSURANCE — ACTION ON ACCIDENT POLICY — CASUALTIES COVERED — QUESTION OF FACT.

Action upon an accident policy insuring the employees of Pickands, Mather & Co. against bodily injuries suffered through external, violent, and accidental means. The policy as printed contained a provision that it did not cover casualties resulting from certain specific causes, among which sunstroke was included. The assured wanted a policy which covered sunstroke, and, for this reason, the word "sunstroke" was stricken from this provision. Deceased died from sunstroke. Under the facts of this case the court cannot hold, as a matter of law, that sunstroke is a disease, and not such a casualty as was covered by the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

2. INSURANCE—CONSTRUCTION OF POLICY—PRELIMINARY NEGOTIATIONS.

Where the proper construction of a contract is not free from doubt, recourse may be had to the preliminary negotiations between the parties for the purpose of determining the correct construction to be given it.

(For other cases, see Insurance, Cent. Dig. §§ 313, 354; Dec. Dig. § 155.)

(Additional Syllabus by Editorial Staff.)

3. WORDS AND PHRASES—"SUNSTROKE"—"HEATSTROKE."

The words "sunstroke" and "heatstroke" are synonymous, and mean a sudden prostration resulting from exposure to excessive heat, regardless of the source from which the heat emanates.

(For other definitions, see Words and Phrases, vol. 7, p. 6790.)

Appeal from District Court, St. Louis County; Bert Fesler, Judge.

Action by Samuel Mather and others against the London Guarantee & Accident Company, Limited. Verdict for plaintiffs, and, from denial of motion for judgment, or for new trial, defendant appeals. Affirmed.

Alexander Marshall, of Duluth, for Appellant.
Washburn, Bailey & Mitchell, of Duluth, for Respondents.

TAYLOR, C.

Defendant issued to Pickands, Mather & Co., as trustees for their employees, an accident policy insuring such employees

* Decision rendered, March 13, 1914. 145 N. W. Rep. 963. Syllabus by the Court.

against accidental injuries. John Mozina, one of the employees so insured, while at work in a boiler room, suffered a "sunstroke" or "heatstroke" from which death ensued. Plaintiffs brought suit upon the policy and recovered a verdict. Defendant made the usual motion for judgment or for a new trial, and appealed from the order denying it.

[1-3] It is conceded at the outset that sunstroke and heat-stroke are synonymous, and mean a sudden prostration resulting from exposure to excessive heat, regardless of the source from which the heat emanates. The controversy is whether the policy covers injury and death from sunstroke. Defendant contends that sunstroke is not an accident but a disease; that the medical authorities class it as a disease; and that the courts have held that it is not an accident. *Sinclair vs. Maritime Pass. Assur. Co.*, 3 El. & El. 478; *Dozier vs. Fidelity, etc., Co. (C. C.)* 46 Fed. 446, 13 L. R. A. 114. On the other hand plaintiffs contend that the ordinary person regards sunstroke as an accident; that it is within the definition of an accident (*Kerr on Insurance*, 380; *May on Insurance*, §§ 518-520); that it is held to be an accident within the meaning of the English Workingmen's Compensation Act (*Ismay, Imrie & Co. vs. Williamson*, 24 Times L. Rep. 881; *Morgan vs. Owners of Steamship Zenaida*, 25 Times L. Rep. 440); and that giving the terms "accidental and sunstroke" their ordinary and popular meaning, instead of a technical one, brings sunstroke within the casualties covered by the policy. It is not necessary to determine these contentions as abstract propositions. The policy insured the employees against "bodily injuries suffered * * * through external, violent and accidental means." It contained a further provision that it did not cover "injuries fatal or otherwise, received while or in consequence of being or having been under the influence of or affected by or resulting directly or indirectly from intoxicants, anaesthetics, narcotics, sunstroke, freezing, vertigo, sleepwalking, fits, hernia, orchitis or any disease or bodily infirmity." This exception includes two classes of injuries: First, those "received while or in consequence of being or having been under the influence of or affected by * * * intoxicants, anaesthetics, narcotics, sunstroke," etc., but not resulting from these causes; second, those "resulting directly or indirectly from" such causes. The form of policy was prepared and printed by defendant. As so prepared and printed, injuries received in consequence of being under the influence of or affected by sunstroke, and injuries resulting from sunstroke, were excepted from the casualties insured against. Before the assured accepted the policy in controversy, the word "sunstroke" was stricken out, as indicated in the paragraph quoted above, so that injuries received in consequence of being under the influence of sunstroke, and injuries resulting from sunstroke, are not expressly excepted from the casualties covered by this policy. There was uncertainty as

to whether injuries suffered through accidental means would include injuries resulting from sunstroke, and defendant, in preparing its policy, resolved the doubt in its own favor by expressly excepting them. As a result of the negotiations for this policy, sunstroke was stricken from the list of exceptions specified therein. Under the circumstances, this would indicate an intention to resolve the uncertainty respecting it in favor of the assured; especially so in view of the rule that insurance policies are to be construed liberally in favor of the assured, and doubtful and ambiguous questions resolved against the insurer. Where the proper construction of a contract is not free from doubt, resource may be had to the preliminary negotiations between the parties for the purpose of determining the correct construction to be given it. *Sandretto vs. Wahlsten*, 144 N. W. 1089, and cases there cited. Defendant's representative admitted that the word "sunstroke" was stricken from the exceptions because Pickands, Mather & Co. objected to it, and insisted that they wanted a policy which would cover sunstroke. The change was made for the purpose of giving them such a policy.

Under the facts and circumstances shown in this case the court cannot hold as a matter of law that sunstroke was not covered by the policy. The issues were submitted to and determined by the jury and there is no sufficient ground for interfering with their conclusion. There were no reversible errors, either in the rulings upon the admission of evidence, or in the charge to the jury.

Order affirmed.



EMPIRE LIFE INS. CO. *vs.* ALLEN.*

(Supreme Court of Georgia.)

1. APPEAL AND ERROR—DISPOSITION OF CAUSE—AFFIRMANCE—DIVIDED COURT.

A judgment refusing a new trial will not be reversed upon a ground as to the merits of which the Justices of the Supreme Court are equally divided in opinion.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4421-4427; Dec. Dig. § 1123.)

2. INSURANCE — ACCIDENT POLICY — CONSTRUCTION — "VOLUNTARY EXPOSURE."

Where a policy of accident insurance contains a condition that it does not cover cases "when the accident or disability results wholly or partly, directly or indirectly, for voluntary exposure to unnecessary danger," these words mean an intentional exposure to unnecessary danger, and imply a conscious knowledge of the danger.

* Decision rendered, Feb. 26, 1914. 81 S. E. Rep. 120. Syllabus by the Court.

(a) Consequently, in the trial of a suit to recover the amount of the insurance alleged to have accrued to the estate of the insured by reason of the accidental death of the insured in an automobile wreck, it was not error for the court to instruct the jury thus: "In order for the provision of the accidental feature of the policy, which relieves the company in case of voluntary exposure to unnecessary danger, to be an excuse from liability, three elements are essential: First, a conscious knowledge of the danger; second, an intentional or willful exposure to it; and, third, that the danger shall be unnecessary."

(For other cases, see Insurance, Cent. Dig. §§ 1180, 1181; Dec. Dig. § 461.)
(For other definitions, see Words and Phrases, vol. 8, pp. 7346-7350.)

3. INSURANCE — ACCIDENT POLICY — INTOXICATION — FINDINGS—EVIDENCE.

Where a policy of accident insurance provided that the insurance did not cover cases of "accident or disability while under the influence of intoxicants or narcotics," and, on the trial of a suit to recover the amount of the insurance, the evidence for the defendant tended to show that, just previous to taking the trip on which the accident occurred, the insured took a bottle of beer in a "near beer" saloon, and the evidence for the plaintiff tended to show that at the time of the accident the insured was not under the influence of intoxicants, a finding for the plaintiff under this issue will not be declared contrary to law.

(For other cases, see Insurance, Cent. Dig. §§ 1691-1693; Dec. Dig. § 659.)

4. INSURANCE — APPEAL AND ERROR — DISPOSITION OF CAUSE—RECOVERY OF ATTORNEY'S FEES.

There being no evidence to authorize a finding of attorney's fees on the ground that the refusal of the insurance company to pay the loss within sixty days (Civil Code 1910, § 2549) was in bad faith, a verdict for such fees will not be sustained. This will not require a new trial, but direction is given to write off the attorney's fees.

(For other cases, see Insurance, Cent. Dig. §§ 1805, 1806; Dec. Dig. § 675.)

5. SUFFICIENCY OF EVIDENCE.

The verdict is supported by the evidence.

Error from Superior Court, Marion County; S. P. Gilbert, Judge.

Action by Isabella Allen, as administratrix, against the Empire Life Insurance Company. Judgment for plaintiff, and defendant brings Error. Affirmed, with directions.

F. A. Hooper, of Atlanta, and W. P. Wallis, of Americus, for Plaintiff in Error.

Geo. P. Munro and T. B. Rainey, both of Buena Vista, for Defendant in Error.

CONTINENTAL CASUALTY CO. vs. OGBURN.*

(Supreme Court of Alabama.)

1. APPEAL AND ERROR—REVIEW—NECESSITY OF BILL OF EXCEPTIONS.

A ruling on motion to strike a particular pleading, to be reviewable, must be shown by bill of exceptions; the minute entry thereof in the record not being enough.

(For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.)

2. INSURANCE — PRELIMINARY PROOFS — WAIVER OF DEFECTS—EVIDENCE.

Evidence, in an action on an accident policy for a death loss, *held* sufficient to go to the jury on the question of waiver of defects in the preliminary proofs of loss.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

3. INSURANCE — ACCIDENT POLICY — CAUSING CONTINUOUSLY TOTAL INABILITY.

Evidence, in an action on an accident policy for a death loss, *held* sufficient to go to the jury on the question of accident causing "continuously" thereafter total inability to labor.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

4. NEW TRIAL—MISCONDUCT OF JURORS—AFFIDAVITS OF JURORS.

Affidavits of jurors may not be received to impeach, for purpose of new trial, their verdict for misconduct in the jury room.

(For other cases, see New Trial, Cent. Dig. §§ 290-296; Dec. Dig. § 143.)

5. NEW TRIAL—MISCONDUCT OF JURY AND JUDGE.

It is not ground for new trial that a member of the jury telephoned the judge that they were not agreed, and that there seemed to be no prospect of an agreement, and that the judge stated that, if they could agree, he would like them to do so, as this was a second trial, and there had been considerable cost to the county, and if they could not then agree perhaps they could in the morning.

(For other cases, see New Trial, Cent. Dig. §§ 88-95; Dec. Dig. § 47.)

6. TRIAL—ADJOURNMENT—ABSENCE OF WITNESS—DISCRETION.

Whether a trial should be suspended, at request of a party, till arrival of a witness, not previously summoned, is in the sound discretion of the trial court.

(For other cases, see Trial, Cent. Dig. § 42; Dec. Dig. § 26.)

7. APPEAL AND ERROR—REVIEW—DENIAL OF NEW TRIAL—VERDICT AGAINST EVIDENCE.

The denial of a new trial on the ground of the verdict being contrary to the evidence will not be reversed, unless, allowing all reasonable pre-

* Decision rendered, Feb. 14, 1914. 64 South. Rep. 619.

sumptions for its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince that it is wrong and unjust.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.)

Appeal from Circuit Court, Jefferson County; E. C. Crowe, Judge.
Action by Lula Ogburn against the Continental Casualty Company.
Judgment for plaintiff, and defendant appeals. Affirmed.

Charles A. Calhoun, of Birmingham, for Appellant.
Riddle, Ellis, Riddle & Pruet, of Columbiana, and Black & Davis, of Birmingham, for Appellee.

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VICARS vs. ÆTNA LIFE INS. CO.*
(Court of Appeals of Kentucky.)

1. INSURANCE—ACTION ON POLICY—PLEADING.

A petition, containing no allegation as to suicide is demurrable, where the policy sued on provides that the insured shall not be liable in case of death by suicide.

(For other cases, see Insurance, Cent. Dig. §§ 1554, 1593, 1598; Dec. Dig. § 639.)

2. INSURANCE—ACTION ON POLICY—ANSWER.

An insurer, relying on the defense that the insured came to his death by suicide, must allege the fact affirmatively, instead of traversing the allegation in the petition that he did not die by suicide.

(For other cases, see Insurance, Cent. Dig. §§ 1554, 1609-1612, 1614-1624; Dec. Dig. § 640.)

3. INSURANCE—SUICIDE.

There may be a recovery on a policy insuring against death from bodily injuries "by violent and accidental means, suicide (sane or insane) not included," if the insured was so insane that he did not know that he was taking his life, or that his act would probably result in death.

(For other cases, see Insurance, Cent. Dig. §§ 1159-1161; Dec. Dig. § 446.)

4. APPEAL AND ERROR—OBJECTIONS—PLEADING.

The objection that the amended petition is inconsistent with the original petition cannot be made for the first time on appeal.

(For other cases, see Appeal and Error, Cent. Dig. § 1149; Dec. Dig. § 195)

5. EVIDENCE—PRESUMPTIONS.

The law does not presume suicide.

(For other cases, see Evidence, Cent. Dig. § 79; Dec. Dig. § 59.)

6. INSURANCE—ACTION ON POLICY—EVIDENCE.

A plaintiff, alleging in his petition on an accident policy that insured did not die by suicide, makes out a *prima facie* case by showing that the

* Decision rendered, March 13, 1914. 164 S. W. Rep. 106.

insured died from a pistol shot, and the burden shifts to the defendant to show death by suicide.

(For other cases, see *Insurance*, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.)

Appeal from Circuit Court, Kenton County, Criminal, Common Law, and Equity Division.

Action by T. P. Cherrington Vicars against the *Aetna Life Insurance Company*. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

B. F. Graziani, of Covington, and Horace W. Root, of Newport, for Appellant.

Galvin & Galvin, of Cincinnati, Ohio, for Appellee.

CASUALTY, SURETY AND MISCELLANEOUS.**UNITED STATES CIRCUIT COURT OF APPEALS.
NINTH CIRCUIT.**

PENNSYLVANIA CASUALTY CO.

vs.

WHITEWAY ET AL. (No. 2,297.)*

1. APPEAL AND ERROR—REVIEW—VERDICT—PROCEEDINGS IN TRIAL COURT.

A jury's verdict is not subject to review unless there is an entire absence of substantial evidence to sustain it, and there has been a request for a peremptory instruction and an exception taken to the ruling of a trial court.

(For other cases, see Appeal and Error, Cent. Dig. §§ 1290-1298, 1300, 1303, 3922, 3928-3934; Dec. Dig. §§ 209, 1001.)

2. APPEAL AND ERROR—FINDINGS BY COURT—REVIEW.

Where an action at law is tried to the court and a jury is waived, the court's general finding stands as the verdict of a jury and may not be reviewed unless the lack of evidence to sustain the finding has been suggested by a ruling thereon or a motion for judgment, or some motion to present to the court the issue of law so involved before the close of the trial.

(For other cases, see Appeal and Error, Cent. Dig. §§ 1290-1298, 1300, 1303; Dec. Dig. § 209.)

3. EVIDENCE—PAROL EVIDENCE—ACCIDENT POLICY—PREMIUM PAYMENTS—EFFECT.

Where, in an action on an accident policy for the amount paid in satisfaction of a judgment for injuries to one of plaintiff's employees, defendant claimed that the employee was not covered by the policy because he was a common laborer and not a "steel man," and it appeared that the policy, while intended to cover all employees, classified them by certain designations, and that defendant's auditor, on inspecting plaintiff's pay roll, demanded and received an additional premium payment, a question, asking one of the plaintiffs what employees' compensation was included in such payments, was admissible and not objectionable as tending to vary the written contract.

(For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 450.)

4. EVIDENCE—HYPOTHETICAL QUESTIONS.

Where a witness testified that he would class a man who worked about a building in process of construction as a utility man and did all kinds of menial labor as a common laborer and not as a steel man, the court did not err in permitting the witness to ask a hypothetical question hypothesizing the different acts of the servant connected with the build-

* Decision rendered, Feb. 2, 1914. 210 Fed. Rep. 782.

ing, and asking whether the witness would say that such a man was working in the capacity of a "steel man" or as a common laborer.

(For other cases, see Evidence, Cent. Dig. §§ 2369-2374; Dec. Dig. § 553.

Facts which must be included in hypothetical questions, see Note to *McIntyre vs. Modern Woodmen of America*, 121 C. C. A. 10.)

In Error to the District Court of the United States for the Southern Division of the District of Idaho; Frank S. Dietrich, Judge.

Action by A. S. Whiteway and another, doing business as A. S. Whiteway & Co., against the Pennsylvania Casualty Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

The plaintiff in error executed to the defendants in error a policy of accident insurance, whereby it agreed to indemnify the assured against loss by reason of liability for damages on account of bodily injuries to their employees while conducting certain building operations, and to defend, in the name and on behalf of the assured, all suits that might be brought at any time on account of such injuries, and to pay all costs and expenses connected therewith, and the judgment, within limitations expressed in the policy. While the policy was in force, one J. C. Irwin, an employee of the defendants in error, was accidentally injured, and thereafter brought an action against the defendants in error to recover therefor. The assured requested the plaintiff in error to defend the action in their name, and on their behalf, and the plaintiff in error refused to do so. The action resulted in a verdict in favor of Irwin in the sum of \$7,500. The defendants in error, in satisfaction of the judgment, paid the sum of \$5,000. Thereafter they commenced the present action to recover the said sum, together with their attorney's fees and costs incurred in the prior action.

The pivotal question in the court below was whether Irwin was a steel man, and covered by the terms of the policy under that classification. The complaint alleged that he was a steel man. The answer denied the allegation, and alleged that he was a common laborer. The policy insured the employees under a schedule naming masons, bricklayers, carpenters, plasterers, painters, steel men, electric wiring and sheet metal workers. There was no express mention of common laborers in the policy. Evidence was taken upon the question whether or not Irwin was a common laborer or a steel man. He testified that he was working at steel work or anything they had to do, steel work, brick work, concrete, or anything they told me to do." One of the defendants in error testified that Irwin was on the pay roll under the schedule of steel men. He was paid \$2.50 a day. There was testimony, on the other hand, that the work at which he was engaged was not that of a steel man, but that of a common laborer. A jury trial was waived. The court made no special findings, but upon consideration of the testimony entered a judgment for the defendants in error for the sum of \$5,000 and the attorney's fees and costs of the prior action.

Before Gilbert, Ross, and Morrow, Circuit Judges.

Martin & Cameron, of Boise, Idaho, for Plaintiff in Error.
Alfred A. Fraser, of Boise, Idaho, for Defendants in Error.

GILBERT, C. J. (after stating the facts as above.)

[1, 2] The burden of the argument of counsel for the plaintiff in error is that the evidence overwhelmingly established the fact that Irwin was not a steel man, as he was classified in the policy, and as alleged in the complaint, but was a common laborer, and it ignores the effect of the judgment of the court below, which must be taken as conclusively establishing the contrary, for there was no motion in the court below for a ruling or judgment on that question at the close of the trial, nor does any assignment of error challenge the finding of the court on the evidence. When an action at law is tried before a jury, their verdict is not subject to review unless there is absence of substantial evidence to sustain it, and even then it is not reviewable unless a request has been made for a peremptory instruction, and an exception taken to the ruling of the court. When a jury is waived, and the cause is tried by the court, the general finding of the court for one or the other of the parties stand as the verdict of a jury, and may not be reviewed in an appellate court unless the lack of evidence to sustain the finding has been suggested by a request for a ruling thereon, or a motion for judgment, or some motion to present to the court the issue of law so involved, before the close of the trial. *Martinton vs. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; *Wilson vs. Merchants' Loan & Trust Co.*, 183 U. S. 121, 22 Sup. Ct. 55, 46 L. Ed. 113; *Boardman vs. Toffey*, 117 U. S. 271, 6 Sup. Ct. 734, 29 L. Ed. 898; *Barnard vs. Randle*, 110 Fed. 906, 49 C. C. A. 177; *United States Fidelity & G. Co. vs. Board of Com'rs*, 145 Feb. 144, 76 C. C. A. 114; *Felker vs. First Nat. Bank*, 196 Fed. 200, 116 C. C. A. 32; *Bell vs. Union Pac. R. Co.*, 194 Fed. 366, 114 C. C. A. 326. There was no such request or motion made in the case in hand, and the judgment of the court below is therefore conclusive of the facts determined thereby.

[3] We find no error in the assignment that the court permitted one of the defendants in error to answer the following question:—

"Q. These payments you made, \$90.10, and this further payment of \$34.80, what employees compensation was included in these payments?"

To which the witness answered:—

"The premium was paid upon the entire pay roll, everybody enumerated in the different schedules. And I would like to state here that when these schedules were prepared, they were prepared by the company and not by Whiteway & Lee. Mr. Sheppard, the agent of the company, when he came soliciting the work, he made these schedules, and I asked him, I said, 'Now, Mr. Sheppard, you state brick masons as a schedule. What does that include? Does

that include simply the brick men who are laying brick, or does it include everybody connected with that branch of the work—the hod carriers, the mortar mixers, and the scaffold handlers?" And he said, "Yes, it includes everybody."

To the answer an exception was taken on the ground that it might tend to vary the written contract. At the time when the \$90.10 were paid, that sum was estimated to be the amount payable as the premium, but the policy reserved to the insurer the right to inspect the pay rolls and to demand further premiums in accordance therewith. The policy covered (section 4) "all such injuries sustained at the locations described in the declarations, by all employees of the assured, whose entire compensation is included in the estimated compensation as shown in statement three of the declarations. * * * All such injuries sustained by drivers and their helpers, lumpers, stevedores, loaders, material handlers, time-keepers, pay clerks, and messengers, whose entire compensation is included in the estimated compensation upon which the premium for this policy is computed, wherever they may be in the service of the assured in connection with the business operations described in the declarations," and one of the conditions of the policy was that "the premium is based upon the entire compensation earned during the policy period by all employees of the assured, not herein elsewhere specifically excluded, engaged in connection with the operations described in and covered by this policy, and statement 5 of the declarations states that the enumeration in the declarations includes all persons in the service of the assured, in connection with the operations, to whom compensation of any nature is paid or allowed, excepting the members of the firm, drivers, and clerks, for the purpose of computing the premium on the policy. It was proved without objection that after the policy was issued, the auditor of the plaintiff in error inspected the pay roll of the assured, and upon the total amount thereof demanded and received the additional payment of \$34.80. The evidence to which the exception was taken was not open to objection on the ground that it tended to vary the written contract. Instead of contradicting or altering the terms of the written contract, it was in harmony therewith, as showing that the intention of the parties was to indemnify the assured against all losses by accident in the operation in which they were then engaged, and that the pay roll was made the basis for the premium rate, and that the occupations of the different workmen enumerated in the declarations were intended by both parties to the insurance contract to include all employees directly engaged in the work in hand. *Fidelity & Casualty Co. vs. Phoenix Mfg. Co.*, 100 Fed. 604, 40 C. C. A. 614.

[4] Error is assigned to the rulings of the court in sustaining objections to the question propounded to the expert witnesses Hammond and Paradise, as follows:—

"Where a firm of contractors was engaged in the construction

of a certain building, a four-story brick building in Boise, and had in their employ a man, a machinist by trade, the nature of whose work consisted in moving steel, shoveling dirt, handling brick, wheeling concrete and in doing most everything there was to do around the building, and whose wages were \$2.50 per day, would you say that this man was working at that time for these contractors in the capacity of a steel man or in the capacity of a common laborer?"

But the record shows that the court did not exclude the testimony so offered, for Hammond answered, "I would class that kind of a man as a general utility man," and Paradise had already answered that he could not say what a steel man was in the building trade, but that he could answer about a structural steel man, and that a common laborer is a man "who works around a building as a general utility man, and does all kinds of menial labor." After he had so answered, there was no error in the refusal of the court to sustain an objection to the hypothetical question above quoted.

There are other assignments of error; but, as they are not discussed in the brief of the plaintiff in error, and we find no merit in them, we deem it unnecessary to discuss them here.

The judgment is affirmed.



SUPREME JUDICIAL COURT OF MASSACHUSETTS.

SUFFOLK.

COYLE

vs.

UNITED STATES FIDELITY & GUARANTY CO.*

1. INSURANCE—GUARANTY INSURANCE—SCOPE OF BOND.

M. applied to plaintiff for assistance in procuring cash to carry on M.'s business, and to that end they made a contract by which plaintiff agreed to "employ said M. as collector or agent to collect certain bills assigned to" plaintiff, "and to pay and allow said M. 1 per cent on all such collections." The practice of the parties was for M. to assign to plaintiff a number of accounts receivable, due from M.'s customers, and receive from plaintiff their full value, less 15 or 18 per cent, which accounts plaintiff gave to M. for collection as if no assignment had been made; M.'s customers not being notified of such assignment. Afterwards the parties had a settlement, in which M. paid plaintiff "interest and expenses" on the sum paid M. when the assignments were made, and M. never in fact received a commission for collecting the

* Decision rendered, March 3, 1914. 104 N. E. Rep. 559.

accounts assigned. The bond executed by defendant, providing for reimbursement to plaintiff for all loss through M.'s dishonesty, recited that M., "hereinafter called the 'employee,' has been appointed to the position of 'agent and collector' in the service of (plaintiff), hereinafter called the 'employer.'" Plaintiff's statement of the character of the position stated that M.'s "position" was "agent or collector," and that the duties were the "collection of accounts assigned to me for same" for a "commission or percentage as collected." M.'s application for the bond stated that, in addition to his salary as "agent or collector," he was to have an "income from business now in," referring to M.'s business. *Held*, that M.'s collection of accounts assigned by him to plaintiff and appropriation of the proceeds to his own use were not acts committed in the course of the employment described in the bond, so as to make defendant liable to plaintiff therefor.

(For other cases, see Insurance, Dec. Dig. § 430.)

2. INSURANCE—GUARANTY INSURANCE—CONSTRUCTION OF BOND.

The words "for same," used in plaintiff's statement as to the nature of defendant's duties, that they were "collection of accounts assigned to me for same," meant "for myself."

(For other cases, see Insurance, Dec. Dig. § 430.)

Exceptions from Superior Court, Suffolk County; Loranus E. Hitchcock, Judge.

Action by Philip H. Coyle against the United States Fidelity & Guaranty Company. Verdict for plaintiff, and defendant excepts. Exception sustained, and judgment ordered entered for defendant.

Otis Emerson Dunham, of Boston, for Plaintiff.
H. V. Cunningham, of Boston, for Defendant.

LORING, J.

This is an action on a bond by which the defendant Fidelity and Guaranty Company agreed to make good to the plaintiff any and all loss sustained by him through any act of dishonesty on the part of one Mudge, called in the bond an "employee" of the plaintiff.

The defendant rested on the plaintiff's evidence and asked the court to direct a verdict in its favor. This was refused. An exception taken to that ruling is the only exception before us.

[1] We are of opinion that although the evidence showed acts on the part of Mudge which the jury could have found to be dishonest they were not committed in the course of the employment described in the bond, and for that reason the ruling asked for should have been given.

[2] The bond begins with a recital that Mudge, "hereinafter called the 'employee,' has been appointed to the position of agent and collector in the service of Philip H. Coyle, hereinafter called the 'employer,' and has been required to furnish a bond for his honesty in the performance of his duties in the said position." Then follows a recital that the "employer" has delivered to the defendant "a statement in writing setting forth the nature and character of the office or position to which the employee has been

elected or appointed, the nature and character of his duties and responsibilities, * * * which statement is made a part hereof." The statement in writing thus made a part of the bond is in the form of answers given by the plaintiff to questions propounded to him by the defendant. In these answers the plaintiff stated that "the title" of Mudge's "position" was "agent or collector," and that a full explanation of his duties was "collection of accounts assigned to me for same," and that he was to receive a "commission or percentage as collected." We construe the words "for same" to mean "for myself." It is stated in this statement in writing signed by the plaintiff that: "It is agreed that the above answers are to be taken as conditions precedent and as the basis of the said bond applied for; or any renewal or continuation of the same."

The facts put in evidence by the plaintiff which showed the true relation between the plaintiff and Mudge, were in substance as follows: "In January, 1906, Mudge was carrying on or was about to carry on the business of a printer on his own account. Being in need of ready money he applied to the plaintiff for assistance. Thereupon the two executed a written agreement by which the plaintiff agreed "to employ said Mudge as collector or agent to collect certain bills assigned to said Coyle, and to pay and allow said Mudge 1 per cent on all such collections. Said Mudge agrees and accepts the same on above terms, and all collections shall be turned over at once and satisfactory settlement made with said Coyle." This agreement was dated January 12, 1906. The written statement referred to above and made part of the bond was dated January 11, 1906, and the bond itself was dated January 15, 1906. The bond ran for a year and was renewed five times. The course of business pursued by the plaintiff and Mudge during the five years the bond was in effect before the renewal period here in question was as follows: On Mudge's assigning to the plaintiff a number of accounts receivable due to him from his customers, he received from the plaintiff the full value of them less some 15 or 18 per cent. The accounts due Mudge thus assigned to the plaintiff were then committed by the plaintiff to Mudge for collection. With a single exception no notice of the assignment of any one of these receivables was ever given by the plaintiff or Mudge to Mudge's customers from whom the accounts were due, and the receivables were collected from the customers by Mudge as if no assignment of them had been made. Later on (presumably when the due dates of assigned accounts had passed) the plaintiff and Mudge had a settlement. These settlements consisted in Mudge's paying the plaintiff "interest and expenses" on the sum paid him (Mudge) in cash when the accounts were assigned to him by the plaintiff; the "interest and expenses" were added to the sum originally paid in cash and that sum was deducted from the amounts collected by Mudge on the assigned ac-

counts. The "balance" so struck was settled in cash or by an assignment to the plaintiff by Mudge of new accounts receivable on which the plaintiff made a new advance, or partly in cash and partly by a new assignment on which a new advance was made. The plaintiff testified that he "received as a profit on such transactions on an average about 1½ per cent a month." During the five years that the bond was in effect, before the renewal period here in question, Mudge never received a commission or any other compensation for collecting the assigned accounts.

The action now before us was brought to recover reimbursement for Mudge's failure to pay over to the plaintiff \$1,297.02, collected by him on accounts assigned to the plaintiff on May 15, 1911. The \$1,297.02 was used by Mudge for his own benefit.

We are not able to adopt the defendant's contention that as matter of law the real nature of the transaction between the plaintiff and Mudge was a running account by way of loan secured by the accounts assigned to the plaintiff by Mudge. Doubtless the jury could have found that to be the true relation between the plaintiff and Mudge; but they were not bound as matter of law to do so. For that reason this was not a ground for directing a verdict for the defendant. Neither have we been able to adopt the further contention made by the defendant that as matter of law, on the evidence in the case, Mudge had authority to use the money collected by him in his business, in which case, under the doctrine of Commonwealth vs. Stearns, 2 Metc. 343, and Commonwealth vs. Libby, 11 Metc. 64, 45 Am. Dec. 185 (for a collection of the later cases see Commonwealth vs. Moore, 166 Mass. 153, 44 N. E. 612), his failure to account for the sums collected by him would not have amounted to embezzlement and so would not have come within the terms of the bond. There was no pretense that Mudge was to collect for several employers, as was the case in Commonwealth vs. Libbey, *supra*.

But we are of opinion (taking the view of the evidence most favorable to the plaintiff) that the true relation between the plaintiff and Mudge was materially different from that stated in the bond including the written statement signed by the plaintiff referred to in and made part of it. The relation there stated is that existing in the ordinary case of an "agent or collector" employed to collect accounts assigned to his employer for his (the employer's) benefit, the "agent or collector" receiving for so doing a "commission or percentage" on the accounts as they are collected. There is no suggestion in the bond or in the written statement made part of it that the assigned accounts in the case at bar to be collected by the employee were accounts originally due to the employee and earned by him in the course of a business which he was to continue to carry on on his own account; nor that the "assigned" accounts receivable were to be assigned by the employee to the employer for money paid by the employer to the employee,

nor that in ordinary course of business the employee would not in fact be paid for collecting the assigned accounts. The farthest that the bond and the papers accompanying it go in this connection is a statement in Mudge's application for the bond that in addition to the salary to be paid him as "agent or collector" for the plaintiff he was to have "income from business [he was] now [then] in." The only contingency in which (tested by the course of business pursued by the plaintiff and Mudge during the five years here in question) a commission would have been in fact paid to Mudge for collecting the accounts assigned to the plaintiff was in case no settlement was subsequently made by which Mudge got back from the plaintiff part of the 15 to 18 per cent deducted from the fact of the assigned accounts when they were assigned to him. And there was no instance during those five years and four months when such a subsequent settlement was not made.

The likelihood of a person in Mudge's position (under the course of business pursued by the plaintiff and Mudge during the five years here in question) misapplying collections is quite different from that in the ordinary case of an "agent or collector" who collects accounts for a "commission or percentage" where the "agent or collector" has no other interest in or relation to the accounts to be collected than his employment to collect them. Under the course of business here in question the accounts to be collected were earned by Mudge in his business. To be sure they had been assigned to the plaintiff and Mudge had received an advance when they were assigned. But judged by the course of business there was an expectation, although no obligation, that the collections would be settled, in part at least, by a new advance on a new assignment of further receivables. And, as we have said, under the course of business there was to be no payment of a "commission or percentage" to Mudge except in the remote contingency of no such subsequent settlement being made and of the collections made being paid over to the plaintiff—a thing that in the five years in question never had taken place. The temptation for Mudge, in case business became even less prosperous, to make what might be thought to be a temporary use of money collected on such receivables under the expectation that the matter would be adjusted at the next settlement on his (Mudge's) procuring a new advance by making an assignment of further receivables, is quite different from the temptation to embezzle collections where the collector is paid a commission, as the collections are made, for making the collections and paying over the sums collected.

No cases have been brought to our attention which are decisive of the case at bar. It has been held in some cases that a fidelity and guaranty company is not entitled to the consideration that an ordinary surety is entitled to. See *Atlantic Trust Co. vs. Laurinburg*, 163 Fed. 690, 90 C. C. A. 274; *Guaranty Co. vs.*

Pressed Brick Co., 191 U. S. 416, 426, 24 Sup. Ct. 142, 48 L. Ed. 242. If this be adopted as the measure of the duty owed such a company, this bond in our opinion did not cover the transactions between the plaintiff and Mudge. For somewhat similar cases against sureties not in the business, see Boston Hat Manuf. Co. vs. Messinger, 2 Pick. 223; Griswold vs. Hazard, 141 U. S. 260, 11 Sup. Ct. 972, 999, 35 L. Ed. 678; Remington Co. vs. Kezertee, 49 Wis. 409, 5 N. W. 809; Barnes vs. Savings Bank, 149 Iowa, 367, 128 N. W. 541; Jungk vs. Holbrook, 15 Utah, 198, 49 Pac. 305, 62 Am. St. Rep. 921; Powers Co. vs. Harlin, 68 Minn. 193, 71 N. W. 16, 64 Am. St. Rep. 460; Pidcock vs. Bishop, 3 B. & C. 605.

If Mudge had misapplied collections made by him when acting as an ordinary "agent or collector" of accounts assigned to the plaintiff where the "agent or collector" was to be paid "a commission or percentage" as the accounts were collected, reimbursement could have been obtained by an action on this bond. But the failure to pay over collections which has given rise to this action was not committed in the course of such an employment. It follows that the judge should have directed the jury to return a verdict for the defendant, and the exception taken to his refusal so to do must be sustained.

We are further of opinion that judgment should be entered for the defendant under St. 1909, c. 236; and it is

So ordered.



COURT OF APPEALS OF NEW YORK.

BRASSIL

vs

MARYLAND CASUALTY CO.*

INSURANCE—LIABILITY INSURANCE—EXPENDITURES BY INSURED—LIABILITY.

A casualty insurance company, whose contract gave it the option of defending any suit, settling its own cost, or paying insured the stipulated indemnity, and provided that insured should not settle any claim except at its own cost, or incur any expense without the insurer's consent, refused an injured person's offer of settlement for \$1,500, the amount of the policy, and elected to defend the suit which resulted in a judgment for over \$6,000. It refused to appeal, but offered to pay insured \$1,500 upon his satisfaction of the judgment, whereupon insured appealed and secured a reversal. The action was subsequently

* Decision rendered, Feb. 24, 1914. 104 N. W. Rep. 622.

dismissed. *Held*, that the insurer, by electing to defend and denying insured the right to settle on his own account or assume charge of the litigation and by refusing to appeal or to pay the stipulated indemnity except upon satisfaction of the judgment, violated the obligation of good faith which underlies all contracts, and was liable for the expenses incurred by insured in prosecuting the appeal.

(For other cases, see Insurance, Dec. Dig. § 513.)

Appeal from Supreme Court, Appellate Division, First Department.

Action by Daniel S. Brassil against the Maryland Casualty Company. From a judgment on a verdict for plaintiff affirmed by the Appellate Division, First Department (147 App. Div. 815, 133 N. Y. Supp. 187) by a divided court, defendant appeals. Affirmed.

In June, 1899, the defendant, a casualty insurance company, issued to the plaintiff its policy of insurance whereby it agreed, in consideration of the stipulated premium, to indemnify the plaintiff "against loss from common-law or statutory liability for damages on account of bodily injuries" suffered by any of his employees. The limit of its liability for an accident to any one employee was fixed at \$1,500. During the term of the policy, one of the plaintiff's employees, a young man named Loughlin, under the age of 21, was injured. He and his father commenced actions against the plaintiff to recover damages on account of the accident. While these actions were pending, the plaintiff received an offer from the attorneys for the Loughlins stating that they would settle the actions for \$1,500. This the plaintiff communicated to the defendant, and requested and urged its permission to settle upon that basis. The defendant refused the request upon the ground that the sum named was excessive. It elected to defend the actions, as it had the right to do under the provisions of the policy, and the actions proceeded to trial; the defendant taking control of the defense thereof. They resulted in judgments against the plaintiff here aggregating over \$6,000.

After all this had transpired, and the plaintiff had been thus mulcted in damages exceeding by \$4,500 the amount for which he was insured, the defendant wrote to the plaintiff stating that it did not consider an appeal would be advantageous, that it would not prosecute an appeal, but "holds itself ready to comply with the terms of its contract with you in case you should satisfy the judgment rendered against you." It further signified its willingness to permit the plaintiff to substitute his own attorney to prosecute an appeal. To this letter the plaintiff replied, in substance, that inasmuch as the defendant had refused the offer to compromise the Loughlin suits for \$1,500, and through its conduct had inflicted a much greater liability upon him, he would hold the defendant liable for the full amount.

Thereafter the plaintiff, through his own attorney, appealed from the main Loughlin judgment to the Appellate Division of the Supreme Court, where it was unanimously affirmed. He procured leave to appeal to this court, and here the judgment was re-

versed for errors committed upon the trial and a new trial was ordered. Loughlin vs. Brassil, 187 N. Y. 128, 79 N. E. 854. No new trial was had, however, and the Loughlin actions were subsequently dismissed for want of prosecution.

This action was then commenced to recover from the defendant the expense to which the plaintiff had been subjected in prosecuting the appeal from the Loughlin judgment, including his attorney's fees amounting, as claimed by the plaintiff to \$2,611. He recovered a judgment of \$2,211. On appeal by the defendant from that judgment to the Appellate Division there was an affirmance. The defendant has now appealed to this court.

The policy first insured the plaintiff "against loss from common-law or statutory liability for damages" to his employees. It then contained certain clauses called "special agreements," among which was a limitation of \$1,500 for any accident to an employee. The other "special agreements" have no bearing upon this controversy. Attached to the policy and printed on the reverse side thereof were a number of so-called "conditions precedent." Among these conditions were the following:—

"(2) If * * * any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, immediate notice thereof shall be given to the company, and the company will defend against such proceeding, in the name and on behalf of the assured, or settle the same at its own cost, unless it shall elect to pay the assured the indemnity provided for.

"(3) The assured shall not settle any claim, except at his own cost, nor incur any expense, nor interfere in any negotiation or settlement or in any legal proceeding without the consent of the company previously obtained in writing. * * *

"(8) No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. No such action shall lie unless brought within the period within which a claimant might sue the assured for damages unless at the expiry of such period there is such an action pending against the assured, in which case an action may be brought against the company by the assured within thirty days after final judgment has been rendered and satisfied as above. In no case except that of minors shall any action lie against the company after the expiration of six years from the date of the given injuries or death. The company does not prejudice by this cause any defenses to such action which it may be entitled to make under this policy."

James J. Mahoney, of New York City, for Appellant.

Thomas F. Manger, of Brooklyn, for Respondent.

WERNER, J. (after stating the facts as above.)

The action is novel. The question is whether an "insured" under a contract of indemnity for common-law or statutory liability to employees can recover of the "insurer" his reasonable expenses in the prosecution of appeals which the insurer has refused to take, after the insured has been cast in judgment in the court of first instance. The mere statement of the question indicates that the answer must depend upon the circumstances. What were the circumstances in the case at bar? The amount for which the plaintiff was insured in the case of accident to any one employee was \$1,500. Before the trials of the two actions brought against this plaintiff, the plaintiffs therein offered to settle them for \$1,-500. This offer was communicated to the defendant in this action, the insurance company, which declined to entertain it, although the plaintiff requested and urged that it be accepted. The situation at that time was that the defendant under its contract of indemnity had the right to exercise either of three options: (1) To pay the plaintiff, as insured, the sum of \$1,500 and leave him to settle or litigate the suits brought against him. (2) To settle the suits on such terms as it could exact. (3) To defend the suits at its own cost through its own counsel. It decided upon the latter course, and this necessarily implies such a degree of examination into the merits as to indicate that in the judgment of its counsel there was good ground for a defense. From that moment the plaintiff was no longer a free agent. By the express provisions of his contract he was denied the right to settle on his own account or to assume charge of the litigation. In these circumstances the cases proceeded to trial and judgments were rendered against him for upwards of \$6,000. One would naturally suppose that, in view of the defendant's previously declared determination to defend those actions, there would have been the prompt appeals usual in such cases. But it was not so here. The defendant, having succeeded in getting the plaintiff mulcted in damages largely exceeding the indemnity to which he was entitled under his policy, graciously announced that it "holds itself ready to comply with the terms" of the contract in case the defendant should satisfy the judgments which had been recovered against him. The plaintiff was naturally indignant and retorted that he would prosecute the appeals on his own account and hold the defendant responsible for the cost.

The mere statement of this unique situation indicates that the true measure of the rights of the plaintiff on the one hand and of the obligations of the defendant on the other is not to be found in the letter of the contract of insurance. That contract, by its very terms, was designed to exclude any such liability. But there is a contractual obligation of universal force which underlies all written agreements. It is the obligation of good faith in carrying out what is written. The defendant's failure to observe this

requirement of the contract in suit is the thing upon which its liability may safely be predicated. Its failure to continue the defense of these cases was in effect a breach of its contract. We do not go so far as to hold that a contract to "defend" a suit necessarily raises an obligation to prosecute an appeal. That is not the question with which we are now concerned. The fact is that the defendant had decided that the actions against the plaintiff should be defended, and its position was that the amount for which the plaintiff proposed to settle was excessive. This was followed by a verdict four times as large as the offer of settlement. But that is not all. The plaintiff was not even then given the privilege of settling the cases upon such terms as he could make. He was offered his so-called indemnity of \$1,500, but upon the condition that he should first satisfy the judgments. An acceptance of this offer would have destroyed his right to appeal and left him absolutely liable on judgments largely in excess of the amount he could have recovered from the defendant. Having thus effectually tied the plaintiff hand and foot, the defendant left him to continue the fight as best he could. Even this conduct might stand the test of legal principles, if not of good morals, had there not in fact been a good ground of appeal. That there was a legal defense to the actions is attested by the report of the appeal taken by the plaintiff (*Loughlin vs. Brassil*, 187 N. Y. 128, 79 N. E. 854), from which it appears that the judgment in favor of the Loughlins against the plaintiff was reversed.

In the light of these conditions it is idle to look to the letter of the insurance contract for the measure of the defendant's liability, and the fact that there are no precedents for such an action as this is a very impressive indication of the unusual and inequitable attitude of the defendant. Without attempting to further characterize the defendant's position, it is enough to say that it would be a reproach to the law if there were no remedy for so obvious a wrong as was inflicted upon the plaintiff. His rights, as we have said, go deeper than the mere surface of the contract written for him by the defendant. Its stipulations imposed obligations based upon those principles of fair dealing which enter into every contract. Even the defendant has invoked this implied obligation of good faith and fair dealing not expressed in the terms of its written contract, for by its answer it has set forth that it was incumbent upon the plaintiff to "deal fairly and in good faith * * *" and that he should not voluntarily or knowingly do any acts which would impose or tend to impose on him or on this defendant a loss in the premises." If this was the plaintiff's duty, it was not less the correlative obligation of the defendant to "deal fairly and in good faith" with him. The circumstances of this case are peculiar. We do not go beyond them in making our decision.

The judgment appealed from should be affirmed, with costs.

Willard Bartlett, C. J., and Hiscock, Chase, and Collin, JJ., concur. Miller J., not sitting.

Judgment affirmed.



SUPREME COURT OF NEW YORK.

APPELLATE DIVISION. FIRST DEPARTMENT.

DEGNAN

vs.

**GENERAL ACCIDENT, FIRE & LIFE ASSUR. CORPORATION,
LIMITED, OF PERTH, SCOTLAND.***

1. INSURANCE — AGENT'S CONTRACT — RIGHT TO COMMISSION.

Defendant's general agents, having employed plaintiff to secure applications for insurance, agreed to pay him 25 per cent of premiums received on applications which he secured. Plaintiff secured two applications for liability insurance, on which policies were issued, but before they expired, defendant's general agents were changed, and insured procured from the new agents cancellation of the policies and the issuance of new ones for the balance of the term, because they did not wish further dealings with plaintiff. *Held*, that plaintiff, having received commissions on the policies issued to the date of cancellation, was not entitled to recover commissions on the new policies.

(For other cases, see *Insurance*, Cent. Dig. § 126; Dec. Dig. § 84.)

2. INSURANCE — AGENCY CONTRACT — SUBAGENTS — COMMISSIONS.

Defendant, a foreign general insurance company, employed certain general agents to obtain insurance, agreeing to pay 35 per cent of the premiums received. The agents employed plaintiff to solicit risks, agreeing to pay him 25 per cent. Plaintiff received certain liability applications, on which policies were issued by the agents, for which plaintiff received commissions accruing to the date of cancellation before the policies expired, prior to which the agency was changed and new agents appointed, who issued new policies for the balance of the term at the request of the insured. *Held*, that there was no contractual relation between plaintiff and defendant, and, defendant having paid the whole commission to its agents, plaintiff could not recover commissions on premiums received after cancellation of the original policies.

(For other cases, see *Insurance*, Cent. Dig. § 126; Dec. Dig. § 84.)

Appeal from Trial Term, New York County.

Action by Joseph Degnan against the General Accident, Fire & Life Assurance Corporation, Limited, of Perth, Scotland. From a judgment

* Decision rendered, March 6, 1914. 146 N. Y. Supp. 360.

for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed and dismissed.

Argued before Ingraham, P. J., and McLaughlin, Laughlin, Clarke, and Scott, JJ.

Stephen P. Anderton, of New York City, for Appellant.
Lemuel E. Quigg, of New York City, for Respondent.

MC LAUGHLIN, J.

The defendant is a foreign corporation, and in 1911 was represented in this country by Duer & Gillespie, as general agents of its liability insurance department. Duer & Gillespie entered into an arrangement with the plaintiff by which they agreed to pay to him 25 per cent of premiums received for insurance issued upon his application. Subsequent to this agreement he produced two applications for liability insurance, one by the Degnon Contracting Company and the other by James Pilkington, to cover risks incurred in connection with certain work carried on by them. The policies were issued by Duer & Gillespie in the name of the defendant, one to the Contracting Company for a period of one year from October 31, 1911, and the other to Pilkington for one year from November 17, 1911. The premiums upon each policy were fixed at a certain percentage of the monthly pay rolls of the assured. After the policies were issued the John A. Kelly Company succeeded Duer & Gillespie as defendant's general agent. In February, 1912, the Contracting Company and Pilkington, by their representatives, requested the Kelly Company to cancel the policies theretofore issued by Duer & Gillespie and issue similar one for the balance of the term. The reason this change was requested was stated to be that each assured did not wish to have any further dealings or connection with the plaintiff, the one who had procured the insurance. The John A. Kelly Company at first declined to issue new policies to take the place of the old ones, but finally did, on being told if they did not do so the assured would insist upon cancellation, and procure insurance from another company. The policies were canceled on the 1st of March, 1912, and new ones issued for the balance of the year, which were in all respects like the old, except a different person was mentioned as broker. The plaintiff has received his commission upon the policy issued to the Contracting Company to the date of cancellation. He brings this action to recover commissions alleged to have accrued on both policies after the cancellation, and also for commission on the Pilkington policy prior to that time. No proof was offered to the effect that the premium on the Pilkington policy was ever collected for the period prior to the cancellation. He had a recovery, and the defendant appeals.

[1] I am of the opinion that the judgment is erroneous. Plaintiff was not entitled to commissions upon premiums received after the cancellation. His only right to commissions was upon pre-

miums paid upon policies written by Duer & Gillespie. These policies contained the usual clause, giving the right of cancellation to both the assured and the company. The fact is undisputed, and the court so instructed the jury, that if the assured exercised this right, and the insurance company in canceling the policies acted in good faith, then plaintiff was not entitled to recover. Had the jury followed such instruction, then a verdict would have been rendered for the defendant, because the evidence is uncontradicted that the cancellation took place solely at the instance of the assured, and that the defendant acted entirely in good faith in finally acceding to the request to cancel. A finding to the contrary is without evidence to support it. As already stated, it at first declined to cancel, and only agreed to do so by the assured's saying that, unless it did, it would procure insurance elsewhere. The record is barren of any evidence tending to show that the insurance company acted in bad faith towards the plaintiff, or had any interest in the cancellation other than to preserve its own business.

[2] Not only this, but the proof established that the defendant never obligated itself to pay him any commissions whatever. His agreement was with Duer & Gillespie. It agreed to pay him 25 per cent of the premiums received, and up to the cancellation of the policies that amount was received by him. Frederick G. Gillespie was sworn as a witness on behalf of the plaintiff, and testified that Duer & Gillespie, as the general agents of the defendant, received a commission of 35 per cent, which "was all the company was to pay for getting the business"; that 35 per cent was paid to Duer & Gillespie, and out of such payment it had to pay whatever commissions were paid for getting the business. The defendant has paid to Duer & Gillespie 35 per cent of the premiums received prior to the cancellation. This is all that it ever agreed to pay to any one. Of this sum the plaintiff has received 25 per cent, all that Duer & Gillespie agreed to pay to him. He was not entitled to commissions upon premiums thereafter paid.

Attention is called to several alleged errors in the charge which would require serious consideration except for the conclusion reached.

The judgment and order appealed from are reversed, with costs, and the complaint dismissed, with costs.

Ingraham, P. J., and Clarke and Scott, JJ., concur. Laughlin, J., concurs on first ground.

GREAT EASTERN CASUALTY CO. *vs.* ROBINS.*

(Supreme Court of Arkansas.)

1. INSURANCE—HEALTH INSURANCE—“CONTINUOUSLY CONFINED IN THE HOUSE.”

The insured, while treated in a sanatorium for tuberculosis, was “continuously confined in the house” within the provisions of a health insurance policy, though he went out for a short time daily on the advice of his physician.

(For other cases, see Insurance, Cent. Dig. § 1310; Dec. Dig. § 525.)

2. INSURANCE—HEALTH INSURANCE—“TOTAL DISABILITY.”

One was totally disabled within the provisions of a health insurance policy, he being disabled to attend to his business as publisher, though he was able to go to his office a few times to give instructions to his foreman.

(For other cases, see Insurance, Cent. Dig. § 1310; Dec. Dig. § 524.)

(For other definitions, see Words and Phrases, vol. 8, pp. 7010-7012.)

Appeal from Circuit Court, Faulkner County; Eugene Lankford, Judge.

Action by Frank E. Robins against the Great Eastern Casualty Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Miles & Wade, of Little Rock, for Appellant.

R. W. Robins, of Conway, for Appellee.

* Decision rendered, March 2, 1914. 164 S. W. Rep. 750.

JASPER *vs.* STATE.*

(Court of Criminal Appeals of Texas.)

1. INSURANCE—SOLICITING OF INSURANCE—INDICTMENT.

Under Pen. Code 1911, art. 689, making it a misdemeanor for any person for direct or indirect compensation to solicit insurance without a certificate of authority to act as an insurance agent, an information, failing to allege that the solicitor was to receive compensation, either directly or indirectly, charges no offense.

(For other cases, see Insurance, Cent. Dig. § 35; Dec. Dig. § 30.)

2. INDICTMENT AND INFORMATION—MOTION TO QUASH—WAIVER.

A conviction under such information cannot be sustained, though no motion was made to quash it before trial, as the defect was of substance, and not of form, and might be raised at any time.

(For other cases, see Indictment and Information, Cent. Dig. §§ 628-635; Dec. Dig. § 196.)

* Decision rendered, March 4, 1914. 164 S. W. Rep. 851.

Appeal from Nolan County Court; Jno. H. Cochran, Jr., Judge.
G. C. Jasper was convicted of wrongfully soliciting insurance, and he appeals. Reversed.

Wilson & Wilson, of Sweetwater, for Appellant.
R. N. Grisham, of Sweetwater, and C. E. Lane, Asst. Atty. Gen., for the State.

NATIONAL LIVE STOCK INS. CO. *vs.* HENDERSON.*

(Court of Civil Appeals of Texas. Texarkana.)

1. INSURANCE—CONTEMPLATED LOSS—NOTICE.

Where an animal insurance policy provided for notice forthwith by registered mail or telegraph to the main office of the insurer in case of illness or accident to the animal insured, a notice to the insurer's local agent was sufficient; it appearing that the same was immediately forwarded to and received by the insurer.

(For other cases, see Insurance, Cent. Dig. § 1327; Dec. Dig. § 538.)

2. INSURANCE—ANIMALS—ILLNESS—NOTICE—REPORT.

Where an animal insurance policy required notice of sickness or accident forthwith to the insurer with the name of the veterinarian employed, it being impossible for the assured to procure a veterinarian between the time of the serious sickness of the animal and its death, notice of death immediately thereafter was a compliance with the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1328-1336; Dec. Dig. § 539.)

Appeal from District Court, Harrison County; H. T. Lyttleton, Judge. Action by J. L. Henderson against the National Live Stock Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Young & Stinchcomb, of Longview, for Appellant.
P. M. Young, of Marshall, for Appellee.

* Decision rendered, Feb. 6, 1914. Rehearing denied, Feb. 19, 1914. 164 S. W. 852.

LOUIS F. KLEEMAN CO. *vs.* NEW AMSTERDAM CASUALTY CO.*

(Kansas City Court of Appeals. Missouri.)

1. INSURANCE—INDEMNITY INSURANCE—CONSTRUCTION OF CONTRACT—"CHILD."

One between the age of fifteen and sixteen who is employed in violation

* Decision rendered, March 2, 1914. 164 S. W. Rep. 167.

of Rev. St. 1909, § 1719, making it unlawful to employ a child under sixteen and over fourteen without an age certificate, is a child within an indemnity policy exempting the insurer from liability for injuries to a child employed contrary to law.

(For other cases, see Insurance, Cent. Dig. § 1144; Dec. Dig. § 435.)
 (For other definitions, see Words and Phrases, vol. 2, pp. 1115-1141; vol. 8, p. 7601.)

2. CONTRACTS—CONSTRUCTION—REFERENCE TO EXISTING LAW.

A statute which is referred to in a contract concerning the subject thereof enters into such contract.

(For other cases, see Contracts, Cent. Dig. § 749; Dec. Dig. § 166.)

Appeal from Circuit Court, Jackson County; Thos. J. Seehorn, Judge.
 Action by the Louis F. Kleeman Company against the New Amsterdam Casualty Company. From a judgment for defendant, plaintiff appeals. Affirmed.

John C. Stearns and T. C. Sparks, both of Kansas City, for Appellant.
 Rees Turpin and James E. Taylor, both of Kansas City, for Respondent.



JOHN CHURCH CO. vs. AETNA INDEMNITY CO.—AETNA INDEMNITY CO. vs. JOHN CHURCH CO.

(Nos. 1,827, 1,828.)*

(Court of Appeals of Georgia.)

1. INSURANCE—PRINCIPAL AND SURETY—"FIDELITY INSURANCE"—"CONTRACT OF SURETYSHP" DISTINGUISHED FROM "GUARANTY"—"SURETY."

A surety is one who becomes responsible for the debt, default, or mis-carriage of another; the principal remaining bound therefor. A contract of suretyship differs from a guaranty in that the consideration of the latter is a benefit flowing to the grantor. Civ. Code 1910, § 3538. By a contract of fidelity insurance, a fidelity insurance company insures against loss caused by default, neglect, or dishonesty of a trustee, officer, agent, or other employee, or such other person as may be required to give bond, or guarantees the performance of such bonds, as individuals do who sign the bonds of such persons. Civ. Code 1910, § 2550.

(For other cases, see Insurance, Cent. Dig. § 1½; Dec. Dig. § 2; Principal and Surety, Cent. Dig. §§ 1, 6; Dec. Dig. §§ 1, 6.)

(For other definitions, see Words and Phrases, vol. 2, p. 1534; vol. 4, pp. 3179-3186; vol. 8, p. 7676; vol. 8, pp. 6809-6811, 7810-7811.)

2. INSURANCE—FIDELITY INSURANCE POLICY—CONSTRUCTION.

In an action based upon a contract, the rights of both parties are to be

* 80 S. E. Rep. 1093. Syllabus by the Court.

determined by the contract, and the contract is to be so construed as to give effect to the manifest intention of the parties. Even though the contract in the present case be held to be one of fidelity insurance, still the rule that of two constructions the one favorable to the insured must be adopted cannot be availed of to refine away the terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties. While the general purpose of a contract of fidelity insurance is full indemnity, the contract here involved plainly is confined to the faithfulness of the principal in the bond in his discharge of a certain defined duty, without regard to the period of time necessary for its performance. The amount of liability is equally plainly limited. Furthermore, the receipts for premiums clearly evidence that the premium was accepted merely as payment for a continuance of the same limited liability, and not as compensation for a yearly cumulative liability of a like amount.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

3. INSURANCE—FIDELITY INSURANCE POLICY—EFFECT OF RECEIPTS.

When a bond guaranteeing the fidelity of an employee as to a specific duty, and not issued for a definite term, is renewed by the payment of a premium to "continue in force" the contract, there is still only one contract and one penalty, and receipts for premiums in renewal serve only to extend to a new period of time the indemnity provided by the original bond.

(For other cases, see Insurance, Cent. Dig. §§ 276-291; Dec. Dig. § 145.)

4. PLEADING—DEMURRER—REFUSAL TO AMEND—DISMISSAL.

Inasmuch as the plaintiff refused to amend as required by the judgment on the demurrer, the court did not err in dismissing the petition.

(For other cases, see Pleading, Cent. Dig. §§ 549-566; Dec. Dig. § 218.)

Error from City Court of Savannah; Davis Freeman, Judge.
Action by the John Church Company against the Aetna Indemnity Company. From a judgment of dismissal, plaintiff brings error, and defendant files a cross-bill of exceptions. Affirmed on main bill, and cross-bill dismissed.

Wm. B. Stephens and Adams & Adams, all of Savannah, for Plaintiff in Error.

Dodd & Dodd, of Atlanta, Osborne & Lawrence, of Savannah, and Alex. Akerman, of Macon, for Defendant in Error.

ALEX. CAMPBELL MILK CO. *vs.* UNITED STATES
FIDELITY & GUARANTY CO.*

(Supreme Court of New York, Appellate Division, Second Department.)

INSURANCE—INDEMNITY—CONSTRUCTION.

In 1904 defendant executed a bond running for a term of one year, obligating itself to reimburse plaintiff for all losses sustained through the defalcations of an employee to the amount of \$2,500. Thereafter, on the payment of the required premium, three continuation certificates were issued, extending the policy down to the year 1908. The continuations provided that they should be subject to the provisions of the original bond, which declared that defendant should not be liable upon any previous bond; it being mutually understood that but one bond should be in effect at one time. The bond also provided that defendant should in no way be responsible to the employer to a greater extent than \$2,500. *Held*, that the bond and the renewal certificates constituted distinct liabilities rendering the guarantor liable for defaults made during the respective periods covered by the bond of the renewals, up to the amount of \$2,500 per annum.

Appeal from Trial Term, Kings County.

Action by the Alex. Campbell Milk Company against the United States Fidelity & Guaranty Company. From a judgment for plaintiff, and an order denying its motion for new trial, defendant appeals. Affirmed.

Argued before Jenks, P. J., and Burr, Thomas, Carr, and Rich, JJ.

John Patrick Walsh, of New York City (Jerry A. Wernberg, of Brooklyn, and Robert Gray, of New York City, on the brief), for Appellant.

James C. Cropsey, of Brooklyn (Charles C. Clark, of Brooklyn, on the brief), for Respondent.

Per Curiam. Judgment and order affirmed, with costs, upon the opinion of Mr. Justice Stapleton at trial term.

* Decision rendered, Feb. 20, 1914. 146 N. Y. Supp. 92.

LIFE.

UNITED STATES CIRCUIT COURT OF APPEALS.
FIFTH CIRCUIT.

MUTUAL LIFE INS. CO. OF NEW YORK

vs.

HILTON-GREEN ET AL.*

1. INSURANCE—AVOIDANCE OF POLICY FOR FALSE REPRESENTATIONS.

Where a life insurance policy provided that all statements by insured should, in the absence of fraud, be deemed representations and not warranties, it was not avoided by false representations made by insured unless they were made fraudulently, with knowledge, actual or imputed, of their falsity, when he made them, and were material to the risk, tending to influence the insurer to write the policy when, if their falsity had been known to it, it might not have done so.

(For other cases, see Insurance, Cent. Dig. § 560; Dec. Dig. § 265.)

2. INSURANCE—AVOIDANCE OF POLICY FOR FALSE REPRESENTATIONS.

Representations by an applicant for insurance that he had been examined by the insurer's medical examiner, and that no previous application by him had been rejected and passed upon unfavorably, which were untrue to his knowledge, avoided the policy, unless the insurer was estopped to rely thereupon by reason of its knowledge of their falsity.

(For other cases, see Insurance, Cent. Dig. §§ 691, 692; Dec. Dig. § 292.)

3. INSURANCE — FALSE REPRESENTATIONS — KNOWLEDGE OF AGENT IMPUTED TO COMPANY.

Under Gen. St. Fla. 1906, § 2765, providing that every person receiving money for an insurance company for any contract of insurance made by him, or who directly or indirectly makes or causes to be made any contract of insurance, shall be deemed to all intents and purposes an agent or representative of such company, the knowledge of a company's managing and soliciting agents and medical examiners of the falsity of representations by insured was chargeable to the company, in the absence of collusion between them and insured to defraud the company, though acquired in connection with the soliciting and examining of insured for another company; such previous transaction having been of recent happening, and the knowledge not having passed out of the recollection of such agents, but having been rehearsed during the examination for the subsequent policy and when the application therefor was taken, where the only limitation in the policy on the authority of agents was a provision that they were not authorized to modify the policy or extend the time for paying a premium, especially where the policy also provided that representations in the absence of fraud should not be deemed warranties.

(For other cases, see Insurance, Cent. Dig. §§ 990-1015; Dec. Dig. § 379.)

* Decision rendered, Jan. 17, 1914. 211 Fed. Rep. 31.

In error to the District Court of the United States for the Northern District of Florida; Wm. B. Sheppard, Judge.

Action by L. Hilton-Green and another, as executors of C. L. Wiggins, deceased, against the Mutual Life Insurance Company of New York. Judgment for plaintiffs, and defendant brings error. Affirmed.

See, also, 202 Fed. 113, 120 C. C. A. 267.

Before Pardee and Shelby, Circuit Judges, and Grubb, District Judge.

George W. P. Whip, Emmet Wilson, and Philip D. Beall, all of Pensacola, Fla., for Plaintiff in Error.

W. A. Blount, A. C. Blount, Jr., and F. B. Carter, all of Pensacola, Fla., for Defendants in Error.

This was an action to recover upon four policies of life insurance, issued by the plaintiff in error (defendant in the trial court) at one and the same time to the intestate. The suit was instituted in the Circuit Court of the First Judicial Circuit of Florida, and removed to the District Court of the United States for the Northern District of Florida. It was twice tried in that court, each trial resulting in a verdict for the plaintiff for the amount of the four policies with interest and attorneys' fees.

The first judgment was reversed by this court because the policies sued on were erroneously held by the district judge on the first trial to be Alabama contracts, which, under the statute of that state, made them noncontestable for any cause after two annual premiums had been paid. No other question was decided on the former appeal. The opinion of the court appears in 202 Fed. 113, 120 C. C. A. 267.

Upon the second trial, to review the judgment in which the present writ of error is taken, the court below held that the Florida law governed the policies, and other questions only are now presented for decision. They arise entirely out of false statements alleged to have been made or ratified by the insured in the application for the policies and in the reports of the two medical examiners of the defendant, and which the defendant contended avoided the policies. The alleged false answers related to the insured's present and past health history; as to previous illnesses, surgical operations, consultations with physicians, hospital treatment, etc.; also, that he had been examined by the defendant's medical examiners, and that the examiners had correctly recorded his answers; and that he had never applied for other insurance and been rejected or his application not passed upon favorably. The alleged false statements were made the subjects of numerous special pleas by the defendant, to which the plaintiff replied by taking issue thereon and also by alleging knowledge of the falsity of the statements relied upon, on the part of the defendant, through its agents and examiners who were instrumental in writing the policies for it. No questions with relation to the pleadings are assigned as error. The errors relied upon relate altogether to exceptions to the court's oral

charge, and to the refusal of certain charges requested by the defendant. There are twenty-three errors assigned and relied upon for a reversal, all of which have been examined by us. We feel that clearness of presentation will be accomplished rather by a general statement of our views respecting them than by a detailed consideration of each assignment.

GRUBB, D. J. (after stating the facts as above).

The main questions considered on the trial in the court below, and about which the errors insisted upon here relate, were: (1) Whether the alleged false statements must have been fraudulently made by the insured, in order to be availed of by the insurer; (2) whether they must have been material to the risk to have that effect; (3) whether they or any of them were, in fact, material to the risk; (4) whether knowledge of the falsity of the statements made by the insured on which defendant relies, if proven, would be the knowledge of the defendant and estop it from asserting the invalidity of the policies for that reason; and (5) whether the defendant's agents or medical examiners are shown to have had such knowledge.

[1] 1. Each of the policies was alike in form and in its conditions and provisions. Each contained this stipulation:—

"All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties."

When the language of a policy by its terms excludes warranties, it would seem that it leaves false representations made by the insured with substantially the status that they would have with relation to the offense of obtaining money by false pretenses. In order to avoid a contract of insurance, because a party to it was induced to enter into it by false representations of the other party to it, it must be made to appear that the representations were untrue; that they were known to be untrue by the party making them; that they were material inducements to the party, to whom they were made, to enter into the contract; and that the party to whom they were made relied upon their truth, which implies that he was unaware of their falsity.

In the case of *Aetna Life Ins. Co. vs. Outlaw*, 194 Fed. 862, 114 C. C. A. 608, the Circuit Court of Appeals for the Fourth Circuit said of a policy containing a like stipulation:—

"It was decided by the Circuit Court of Appeals of the Eighth Circuit, in the case of *Rice vs. Fidelity & Deposit Co. of Maryland*, 103 Fed. 427, 43 C. C. A. 270, that: 'In insurance a representation is a statement by the applicant to the insurer regarding a fact material to the proposed insurance; and it must be not only false, but fraudulent, to defeat the policy. A warranty, in the law of insurance, is a binding agreement that the facts stated by the applicant are true. It is a part of the contract, a condition precedent to recovery upon it, and its falsity in any particular is

fatal to an action upon the policy.' Accepting this as the definition of a representation, it follows that, in order for a representation, under the terms of this policy, to serve as a defense, it must have been knowingly false, and therefore fraudulent. Unless so knowingly false and fraudulent, it could not be availed of by the insurance company as a defense."

In the case of *Pelican vs. Mutual Life Insurance Co.*, 44 Mont. 277, 119 Pac. 778, the court said:—

"An application for a policy provided that all statements made by the insured should, in the absence of fraud, be deemed representations and not warranties, and that no such statement of the insured should avoid or be used in defense to a claim under the policy, unless contained in the written application, etc. It also recited that all of the answers to the medical examiner were true and were offered as inducements to the issue of the policy. Held, that answers to questions in the application as to insured's prior health history were representations and not warranties, and the falsity thereof would not avoid the policy unless fraudulent, under Rev. Codes, 5043, providing that the language of the policy must be construed most strongly against insurer."

Section 5043, Revised Code, referred to in the citation, and declaring that the language of the policy must be construed most strongly against the pleader, being merely declaratory of the rule of construction as to insurance policies in the absence of statute, does not diminish the weight of this authority.

In the case of *Penn Mutual Co. vs. Trust Co.*, 73 Fed. 653, 19 C. C. A. 316, 38 I. R. A. 33, 70, Circuit Judge Taft held that where a representation was by a statute required to be made "in bad faith," to be available to the insurance company, nothing short of an actual intent to mislead or deceive would suffice; that a misstatement, honestly made, through inadvertence or even gross forgetfulness and carelessness, was not enough.

We are of the opinion that, under the language of these policies, they could be avoided because of false representations made by the insured, only if such representations were fraudulently made, i. e., with knowledge, actual or imputed, upon the assured's part, of their falsity when he made them.

2. We also think that the false representations relied upon to avoid the policies must have been material to the risk, tending to influence the insurer to write the policies, when, if their falsity had been known to it, it might not have done so. The peculiar stipulation of the policies themselves excludes the idea that the representations made by the insured were to be considered warranties, unless they were fraudulently made. If not to be construed as warranties, then, in order to avoid the policies, they must have been material to the risk.

In the case of *Aetna Life Ins. Co. vs. Outlaw*, 194 Fed. 862, 863, 114 C. C. A. 608, 609, the Circuit Court of Appeals for the Fourth Circuit said:—

"The distinction between a warranty and a representation in an application for an insurance policy has by a number of decisions been stated to be that, if the statements are warranted, they must be true in every particular, whether material or immaterial; whereas, if the statements are representations, incorrectness in an immaterial matter will not avoid the policy, although, if incorrect in a material matter, the policy will be avoided."

We hold that, under the language of the policies involved in this suit, the defendant, to avoid the policies for false representations, must establish their falsity, materiality, and the knowledge of the insured, actual or imputed, of their falsity.

3. So far as the alleged false representations related to the insured's previous and present condition of health, as to whether he had suffered from indigestion or from a weak and diseased heart, and whether he was then in good health, we think that the issues were properly left as questions of fact to the jury, both as to the falsity and as to the materiality of these representations. So we think the materiality of the omission of the insured to mention the history of the impacted tooth and the operation for its removal, and the visits of the insured to Hot Springs, Montgomery, and Atlanta, in pursuit of treatment for what turned out to be an inverted tooth, was a question for the jury to determine, under the evidence disclosed in the record.

[2] This leaves for consideration the representation of the insured that he had been examined by Dr. Turberville, defendant's medical examiner, and that the answers recorded by the medical examiner in his report were correct. In truth, there was no such examination had, and the insured must have known that there was none, and the representation that there had been one was a material one. So with regard to the representation of the insured that there had been no previous application for insurance made by him and rejected or not passed upon favorably by the insurance company. This was untrue, must have been known to have been untrue by the insured when he made it, and it was material. Either of these two last representations would be sufficient to avoid the policies, unless the defendant is estopped to rely upon them, by reason of its knowledge of their falsity. It had such knowledge, if at all, because of the knowledge of its agents and examiners, who handled the matter for it.

[3] 4. This brings us to the inquiry as to whether defendant is chargeable with the knowledge of its agents, Hogue and Torrey, and its medical examiners, Kirkpatrick and Turberville, who reported to it that they had examined the insured, and facts indicating that he was an acceptable risk.

In considering this legal question, two facts, peculiar to this case, are to be noticed: (a) The effect of the Florida statute, and (b) the language of the policies sued upon.

(a) Section 2765 of the General Statutes of Florida is as follows:—

"Sec. 2765. Agents.—Any person or firm in this state, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association, firm or individual, or who in anywise, directly or indirectly, makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual."

In the absence of such a statute and under different language in the policies, the case of *New York Life Ins. Co. vs. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934, relied upon by the plaintiff in error, would seem controlling of this case. However, effect must be given to the statute and to the language of the policies.

In the later case of *Continental Ins. Co. vs. Chamberlin*, 132 U. S. 304—310, 10 Sup. Ct. 87, 89 (33 L. Ed. 341), the Supreme Court considered a similar statute of Iowa, and distinguished the case of *Insurance Co. vs. Fletcher*, supra, from one where such a statute controlled, and declined to apply the rule laid down in the Fletcher Case then under their consideration. The court said, referring to such a statute:—

"This statute was in force at the time the application for the policy in suit was taken, and therefore governs the present case. It dispenses with any inquiry as to whether the application or the policy, either expressly or by necessary implication, made Boak the agent of the assured in taking such application. By force of the statute, he was the agent of the company in soliciting and procuring the application. He could not, by any act of his, shake off the character of agent for the company. Nor could the company by any provision in the application or policy convert him into an agent of the assured. If it could, then the object of the statute would be defeated. In his capacity as agent of the insurance company he filled up the application—something that he was not bound to do, but which service, if he chose to render it, was within the scope of his authority as agent. If it be said that, by reason of his signing the application, after it had been prepared, Stevens is to be held as having stipulated that the company should not be bound by his verbal statements and representations to its agent, he did not agree that the writing of the answers to questions contained in the application should be deemed wholly his act, and not, in any sense, the act of the company, by its

authorized agent. His act in writing the answer, which is alleged to be untrue was, under the circumstances, the act of the company. If he had applied in person, to the home office, for insurance, stating in response to the question as to other insurance the same facts communicated by him to Boak, and the company, by its principal officer, having authority in the premises, had then written the answer, 'No other,' telling the applicant that such was the proper answer to be made, it could not be doubted that the company would be estopped to say that insurance in co-operative societies was insurance of the kind to which the question referred, and about which it desired information before consummating the contract. The same result must follow where negotiations for insurance are had, under like circumstances, between the assured and one who in fact, and by force of the law of the state where such negotiations take place, is the agent of the company, and not, in any sense, an agent of the applicant."

In the case of *New York Life Ins. Co. vs. Russell*, 77 Fed. 94-104, 23 C. C. A. 43, 53, the Circuit Court of Appeals for the Eighth Circuit said of the effect to be given the language of a policy as against a similar statute of Nebraska:—

"The obvious purpose of this clause, like that which declared the agent of the insurance companies should be deemed the agent of the insured, is to enable the insurance company to escape from the necessary obligations and liabilities imposed by the law of agency on a principal who commits the conduct of his business to an agent. It is designed to evade a fundamental rule of the law of agency, and to shear its acknowledged agents of their appropriate and accustomed powers and duties, and impose them on the insured. If this application is to receive the construction contended for, no one can safely transact business with an agent of the company; for, while he would be bound by his acts and representations and any information communicated to him by the agent, the company will not be bound by the acts or representations of its agent and any information communicated to him in the conduct of the business of his agency. Under such a rule, the rights and obligations of the contracting parties would not be reciprocal; contracts made with the company's agents would be one-sided; and the company could, at its own election, avail itself of the acts and representations of its agents when it was profitable to do so, and repudiate them when they were likely to prove burdensome. The company cannot play fast and loose in this manner. The persons who are authorized by the company to solicit insurance, take applications, or receive premiums in Nebraska, are made by statute the agents of the company, 'to all intents and purposes'; and it is not within the power of the company to shear these statutory agents of the powers and authority with which the law, for the protection of the public dealing with the company, invests them. These powers are precisely

those which an agent of an insurance company possesses, upon whose powers and authority no' special limitations have been imposed. * * *

"Insurance companies perfectly understand the fact that these applications, which are framed by themselves, and furnished to their agents, are filled up, and the answers to the questions written down, by their agents, and that every applicant accepts without question the advice, direction, and assurance of the agents in all matters relating to the preparation of the application. This is a part of the duty of such agents, and the applicant has a right to assume that they will discharge it intelligently and honestly. He has a right to assume, also, that the agent will honestly and faithfully discharge his duty to his principal. In this case it was the duty of the company's medical examiner to make the report called for by the clause of the application last quoted, if the answer to the question and the information communicated to the medical examiner made such report necessary. This was a duty required of the medical examiner by the company. It would be unprecedented and unreasonable for an applicant to take into his own hands the preparation of the medical examiner's report, and, in doing so, disregard the express advice and direction of the company's medical examiner. * * *

"Under the Nebraska statute, the agents and medical examiner of the defendant company were 'to all intents and purposes' the agents of the company ; and, in their respective spheres, they possessed all the powers and authority conferred on agents and medical examiners of insurance companies by an unqualified appointment as such. It results that the information communicated by the applicant to the company's agents and medical examiner was in contemplation of law communicated to the company itself; and the company therefore, having issued the policy with knowledge of all the facts, will not be heard to defend upon the ground that these facts were not fully set out in the report of its agents or medical examiner. We concur fully in the conclusion reached by the learned judge who tried the case at the circuit, whose opinion is inserted in the statement of the case. The judgment of the circuit court is affirmed."

In view of the Florida statute, we think these two cases are controlling of this case, rather than is the case of *New York Life Ins. Co. vs. Fletcher*, which plaintiff in error relies upon. The statute prescribed that every person who receives money for an insurance company in payment of a contract of insurance, or who directly or indirectly causes to be made any contract of insurance, shall be deemed to all intents and purposes an agent or representative of such company. Under this description, we think Torrey, the defendant's Mobile manager, Hogue, the soliciting agent, and the two medical examiners were agents of the defendant to all intents and purposes, and so, for the purpose of

charging it with notice of what they knew, when the policies were written.

(b) Again, the language of the policies in this case differs from that of the policy in the case of *Life Ins. Co. vs. Fletcher*, *supra*. In that case the policy contained a stipulation:—

"That the rights of the company could in no respect be affected by his verbal statements, or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office."

Of this stipulation the court, in that case, said:—

"The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations expressed therein."

And again:—

"The present case is very different from *Insurance Co. vs. Wilkinson*, 13 Wall. 222 [20 L. Ed. 617], and from *Insurance Co. vs. Mahone*, 21 Wall. 152 [22 L. Ed. 593]. In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. * * * Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, though nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is therefore bound by its statements."

In the case of *Aetna Life Ins. Co. vs. Moore* (decided December 22, 1913) 231 U. S. 543, 34 Sup. Ct. 186, 58 L. Ed.—, the Supreme Court of the United States said:—

"The medical examiner, as we have seen, put down the answer, 'No,' to the question asked Salgue as to whether he had heart disease, after being informed by Salgue that he (Salgue) had been told by physicians that his heart was affected. It appears from the evidence that the other answers of Salgue in his application were written down by the agent of the company; and there is testimony for and against the fact that Salgue informed the agent of the opinion entertained of him by his physicians, and that he also informed the agent of other applications for insurance. It is hence contended that the agent, not Salgue, is responsible for the positive character of the answers, and that the insurance company is estopped by this action of the agent and by his

knowledge of the actual conditions and circumstances. It is therefore further contended that the case comes within the principle of the cases which establish that, where the agent of the company prepares the application or makes representations to the assured as to the character and effect of the statements of the application, he will be regarded in so doing as the agent of the company, and not the agent of the insured. Among the cases cited to sustain the principle are the following in this court: Union Mutual Life Ins. Co. vs. Wilkinson, 13 Wall. 222 [20 L. Ed. 617]; American Life Ins. Co. vs. Mahone, 21 Wall. 152 [22 L. Ed. 593]; New Jersey Mutual Life Ins. Co. vs. Baker, 92 U. S. 610 [24 L. Ed. 68]; Continental Life Ins. Co. vs. Chamberlain, 132 U. S. 304 [10 Sup. Ct. 87. 33 L. Ed. 341]. German-American Life Ass'n vs. Farley [102 Ga. 720, 29 S. E. 615], *supra*, is also cited, and, being a Georgia case, its authority is especially urged.

"There are, however, later cases which enforce the provisions of a policy, and we have seen that it was agreed in the policy under review 'that no statement or declaration made to any agent, examiner or other person, and not contained in' the application, should 'be taken or construed as having been made to or brought to the notice or knowledge of' the company, 'or as charging it with any liability by reason thereof.' And he (Salgue) expressed his understanding to be that the company or one or more of its executive officers, and no other person, could grant insurance or make any agreement binding upon the company.

"The competency of applicants for insurance to make such agreements, and that they are binding when made, is decided by Northern Assur. Co. vs. Grand View Building Ass'n, 183 U. S. 308 [22 Sup. Ct. 133, 45 L. Ed. 213]; Northern Assur. Co. vs. Grand View Building Ass'n, 203 U. S. 106 [27 Sup. Ct. 27, 51 L. Ed. 109]; Penman vs. St. Paul Fire & Marine Ins. Co., 216 U. S. 311 [30 Sup. Ct. 312, 54 L. Ed. 493.]"

So, in the case of the Prudential Ins. Co. vs. Moore, 231 U. S. 560, 34 Sup. Ct. 191, 58 L. Ed. — (decided by the same court the same day), the Supreme Court said:—

"It is contended here, as in the *A&Etna* case, that the company is estopped by the knowledge of the agent, and the same cases are cited as were cited here. We answer here, as we answered there, that the terms of the policy constituted the contract of the parties and precluded variation of them by the agent."

In the case cited, the language of the policy, limiting the authority of the agent, was significantly different from that of the policies in this case. It was:—

"No agent has power in behalf of the company to make or modify this or any contract of insurance, extending the time for paying the premium, to waive any forfeiture or to bind the company by making any promise, or making or receiving any presentation or information."

In this case the corresponding stipulation is "agents are not authorized to modify this policy or to extend the time for paying a premium." In the Moore Case the agent was debarred from making any contract of insurance in advance of the issue of the policy and from receiving any information so as to bind the company. In this case the only restriction upon the agent is against modifying the policy after it is issued and extending the time for paying a premium.

In each of these cases, as in the Fletcher Case, the Supreme Court held that the terms of the contract prevented the knowledge of the agent from estopping the insurance company, as it would have done in the absence of such a stipulation in the policy. In this, they are to be distinguished from this case. Neither in the application nor in the policies involved in this case is there any similar stipulation limiting the authority of the agent. The only limitation upon the power of the agent contained either in the application or in the policy is this:—

"Agents are not authorized to modify this policy, or to extend the time for paying a premium."

The stipulation has no effect until after the contract of insurance has been consummated and the policy issued. It does not purport to limit the power of the agent or examiner in taking the application or the insured's answers or in reporting them to the company. The very provision upon which alone the Supreme Court based its conclusion in the Fletcher and in the Moore Cases is absent from the policies in this case, and the court, in those cases, has said that, in the absence of some such stipulation, the knowledge of the agent or examiner would be that of the company.

The Moore Cases also differ from this case in that there was no Georgia statute similar to the Florida statute with reference to agency. The Supreme Court, after analyzing the then existing legislation in Georgia upon the subject of insurance, stated that its only effect to vary the law of insurance was in providing that in no case should an immaterial false statement operate to avoid the policy.

Again, the policies in the Moore Cases contained no stipulation that representations, in the absence of fraud, should not be deemed warranties, the effect of which, as construed by the courts, is to avoid the policy only for willfully and knowingly false representations, though in the absence of such a stipulation, an innocently false but material representation would forfeit the contract.

Our conclusion is that under the language of the policies sued upon, and under the Florida statute heretofore set out, the knowledge of the defendant's agents, Torrey and Hogue, and of its examiners, Kirkpatrick and Turberville, would be binding upon it, unless there was collusion between such agents and the insured to

defraud the principal. There was evidence in the record from which the jury might have inferred such collusion and also evidence from which it might have reached the contrary conclusion. The court below instructed the jury fully and properly as to the effect of such collusion, and, in view of this fact, its refusal to give the instruction requested by the defendant on this point becomes immaterial.

5. Finally, does the record show that the agents and examiners of defendant had knowledge at the time the policies were written of the falsity of the representations relied upon by defendant to avoid the policies? Both Torrey and Hogue knew of the insured's previous application to the Prudential Insurance Company, and of its result. Kirkpatrick also knew of the history of insured's impacted or inverted tooth and of the operation that removed it. Hogue knew that Turberville had made no examination of insured and that Kirkpatrick had made but a partial one. There is evidence from which the jury might have inferred that Hogue deceived the insured and the examiners as to what was required, and that there was no collusion between the insured and himself to falsely report the examination of the doctors. The evidence as to whether the insured had ever had heart disease or indigestion previous to his applying for the policies sued upon is too unsatisfactory to be a sufficient ground for avoiding the policies, even if it were not known to defendant.

It is contended that the knowledge of defendant's agents and examiners was acquired in a different transaction, namely, the previous soliciting and examining of the insured for the Prudential Life Insurance Company, and, having been so acquired, should not bind the defendant. However, the previous transaction was of recent happening, and the knowledge then acquired is shown not to have passed out of the recollection of defendant's agents, but was rehearsed during his examination for the policies sued on and when his application therefor was taken; and, having been within the actual knowledge of the agents, it should be imputed to the defendant, without reference to how or when acquired. If it was then actually known, it was the duty of defendant's agents to have communicated it to defendant, and, if the jury found that there was no collusion on their part with the insured, the insurer would be chargeable with knowledge of what its agents then actually knew.

We think the charge of the court fairly presented the law, as we have stated it to be, to the jury, and that the refused instructions, when not consistent with it, were erroneous and properly refused. Taken in connection with the entire charge, we find no error in the court's reference to Hogue, as defendant's agent, or in the statement that the agents' and examiners' knowledge was imputable to the defendant. The court also told the jury that col-

lusion between the insured and the defendant's agents would prevent this imputation.

We find no error in the record.

Affirmed.



UNITED STATES DISTRICT COURT.
N. D. NEW YORK.

IN RE DRAPER.*

BANKRUPTCY—PROPERTY BELONGING TO ESTATE—LIFE INSURANCE POLICY—“CASH SURRENDER VALUE.”

Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), providing that life insurance policies belonging to a bankrupt, having a cash surrender value, shall belong to his estate in bankruptcy unless redeemed, is not confined to policies in which the cash surrender value is expressly stated, but includes those having a cash surrender value by the concession or practice of the company issuing them; and hence a policy on a bankrupt's life payable to his wife if she survived him, otherwise to his estate or any designated beneficiary, he having the absolute right to change the beneficiary at any time, and which, though having no cash surrender value, gave him the right, if he lived beyond a stated term, to receive the value of the policy in cash or paid-up insurance, was property which passed to the bankrupt's trustee.

(For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.)

In bankruptcy. In the matter of bankruptcy proceedings of John N. Draper. Petition to review a referee's decision holding that a certain insurance policy on the bankrupt's life passed to the trustee as an asset of the estate. Affirmed.

Arthur T. Johnson, of Gouverneur, N. Y., for Bankrupt.
D. M. Hazelton, of Gouverneur, N. Y., for Trustee.

RAY, D. J.

February 8, 1899, John N. Draper, now bankrupt, insured his life in the New York Life Insurance Company in the sum of \$2,500, under policy No. 922,206, and which policy states that:—

“New York Life Insurance Company by this policy of insurance agrees to pay twenty-five hundred dollars to Nellie C., wife of the insured, or, in the event of her prior death to the insured's executors, administrators or assigns, or to such other beneficiary as may be designated by the insured as hereinafter provided, at the home office of the company, in the city of New York, immediately

* Decision rendered, Feb. 27, 1914. 211 Fed. Rep. 230.

upon receipt and approval of proofs of the death of John N. Draper, of Gouverneur, in the county of St. Lawrence, state of New York (herein called the insured.)"

By express provision it is incontestable after being in force one full year provided the premiums have been duly paid, and :—

"The contract is made in consideration of the written application of the insured, which is a part of this contract, and in further consideration of the annual premium of fifty-seven dollars and thirty-eight cents to be paid in advance, and of the payment of a like sum on the 8th day of February in every year thereafter during the continuation of this policy."

It is a part of the policy that :—

"The insured may at any time during the continuance of this policy, provided the policy is not then assigned, change the beneficiary or beneficiaries by written notice to the company, at its home office, accompanied by this policy; such change to take effect on the indorsement of same on the policy of the company."

The insured, John N. Draper, paid the premiums down to the time of his bankruptcy, and such policy had not been assigned. Neither had the beneficiary been changed. The contract also contains the following "special advantages":—

"Guarantees at End of Accumulation Period.

"This policy participates in surplus as hereinafter provided, but no dividend shall be apportioned to it until the end of its accumulation period, which is twenty years, and ends on the eighth day of February in the year nineteen hundred and nineteen. If the insured is then living, and if the premiums have been duly paid to that date, and not otherwise.

"The company will apportion a dividend to the insured, who shall have the option of continuing, or discontinuing, this policy under one of the following

"Eight Accumulation Benefits:

"(1) Receive the dividend, in cash, and continue this policy at the same premium rate; or

"(2) Receive the dividend, converted into an annual income for life, and continue this policy at the same premium rate; or

"(3) Receive the dividend, converted into additional paid-up insurance, subject to evidence of sound health satisfactory to the company, and continue this policy at the same premium rate; or

"(4) Receive the dividend, in cash, and receive paid-up insurance of twelve hundred and seven dollars, and discontinue this policy (evidence of sound health will not be required); or

"(5) Receive the dividend, in cash, and receive paid-up insurance of seven hundred and sixty-seven dollars, and receive an annual income for life of twenty-three and 1/100 dollars, and discontinue this policy (evidence of sound health will not be required); or

"(6) Receive the entire cash value, as stated below, in cash, and discontinue this policy; or

"(7) Receive the entire cash value, as stated below, converted into an annual income for life, and discontinue this policy; or

"(8) Receive the entire cash value, as stated below, converted into paid-up insurance, and discontinue this policy (evidence of sound health will not be required).

"The company guarantees that the entire cash value of this policy at the end of the accumulation period shall be seven hundred and sixty-seven dollars, and in addition thereto the cash dividend then apportioned by the company."

By other provisions the policy cannot be forfeited after having been in force full three years whether further premiums are paid or not.

It is evident that the beneficiary named, Nellie C., has no right or interest in the policy which cannot be terminated by the action of the insured. No present "cash surrender value" is provided for in the policy, and no proof was given that it has any at this time. It has such a value at the end of twenty years; that is, five years hence. It has considerable value, of course. If Nellie C. should die prior to the death of John N. Draper, then the policy is payable to his executors, etc. If she does not, then at the end of twenty years Draper may take certain benefits, etc., and he at any time may change the beneficiary.

Section 70a of the Bankruptcy Act relating to the "title to property" provides, amongst other things, as follows:—

"Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

In Hiscock, Trustee, etc., vs. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, it was held:—

"The provisions in section 70a of the Bankruptcy Act of 1898 that a bankrupt, having policies of life insurance payable to himself and which have a cash surrender value, may pay the trustee such value and thereafter hold the policies free from the claims of creditors, are not confined to policies in which the cash surrender value is expressly stated, but permit the redemption by the bankrupt of policies having a cash surrender value by the concession or practice of the company issuing the same."

In Matter of White, 23 Am. Bankr. Rep. 90, 174 Fed. 333, 98 C. C. A. 205, 26 L. R. A. (N. S.) 451, the policy of insurance

was payable, as here, to the wife, if she survived him. If she did not, it was payable, as here, to his estate. Then if, after payment of two annual premiums, the policy lapsed for nonpayment of premiums, the company would, on the decease of the insured, issue a policy of paid-up insurance for a certain amount to the beneficiary. Here there is a similar "special advantage" not necessary to recite.

But the case now before this court is controlled by *In re Hettling* (C. C. A. 2d Circuit) 175 Fed. 65, 99 C. C. A. 87. The syllabus is as follows:—

"A policy of insurance on the life of a bankrupt, payable to his wife if she survives him, otherwise to his estate or any designated beneficiary, and which, while having no cash surrender value, gives him the right to change the beneficiary at any time and the privilege of several options if he lives beyond a stated term, among which are to receive its then value in cash or paid-up insurance, is property of the bankrupt which passes to his trustee."

The court said:—

"The policy has no cash surrender value, but the insured is given the power to change the beneficiary at any time. If he survive his wife the policy is payable, not to her, but to his estate; and, if he live beyond the term of twenty years, he is given several options, some of which are: To receive any accumulated dividends in cash or the entire cash value of the property, or to receive the entire cash value converted into an annual income for life. These are property rights, as pointed out in our decision in *Re White* (handed down herewith) 174 Fed. 333 (98 C. C. A. 205, 26 L. R. A. [N. S.] 451), that pass to the trustee under section 70a (5) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451])."

This policy in its terms is the same as that in the *Hettling Case*, *supra*.

It follows that there will be an order affirming the order of the referee.

SUPREME COURT OF ILLINOIS.

NYMAN

vs.

MANUFACTURERS' & MERCHANTS' LIFE ASS'N.*

1. INSURANCE—LIFE INSURANCE—ACTIONS—JURY QUESTION.

In an action upon a life policy, the question whether the insured at the time of her application made misrepresentations as to the state of her health and as to when she was last visited by a physician held, under the evidence, for the jury.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

2. INSURANCE — LIFE INSURANCE — ACTIONS — JURY QUESTION.

In an action on a life policy, the submission to the jury of the question whether the insured was in good health at the time she received the policy held improper, where the uncontradicted evidence showed she was in bad health at the time.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

3. INSURANCE—LIFE INSURANCE—WAIVER OF CONDITION.

Where a life insurance company did not know that the insured, at the time she received her policy and paid the first premium, was not in good health, the insurer's receipt of subsequent premiums during the insured's last illness was not a waiver of the provision that the policy should take effect only on condition that the insured was in good health at the time it was received.

(For other cases, see Insurance, Cent. Dig. §§ 253-262; Dec. Dig. § 141.)

4. TRIAL—INSTRUCTIONS—SUBMISSION OF ISSUES.

It is improper for the court to refuse to submit an issue of the defense, where there is some evidence in its support, even though it is not sustained by the preponderance of the evidence.

(For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.)

Error to Appellate Court, Second District, on appeal from Circuit Court, Winnebago County; Arthur H. Frost, Judge.

Assumpsit by Carl O. Nyman against the Manufacturers' & Merchants' Life Association. There was a judgment for plaintiff (182 Ill. App. 511), and defendant brings error. Reversed and remanded.

Botsford & McCarthy, of Elgin (R. K. Welsh, of Rockford, of counsel), for Plaintiff in Error.

J. E. Goembel, of Rockford (Walter E. Healy, of Elgin, and G. R. Beverley, of counsel), for Defendant in Error.

* Decision rendered, Feb. 21, 1914. Rehearing denied, April 9, 1914.
104 N. E. Rep. 653.

FARMER, J.

Carl O. Nyman, defendant in error (hereafter called plaintiff), brought an action of assumpsit in the Circuit Court of Winnebago County on December 24, 1910, against the Manufacturers' & Merchants' Life Association, plaintiff in error (hereafter called defendant), to recover on a certain contract of insurance or benefit certificate issued by defendant on the life of Anna S. Nyman, in which benefit certificate plaintiff, her sor., was named as beneficiary. The amount of such benefit certificate was \$2,000.

The declaration alleged the issuance on April 15, 1910, and subsequent delivery, of the benefit certificate to insured, naming plaintiff as beneficiary; the payment of assessments by insured as they became due; the death of insured June 22, 1910, that proof of death was furnished the defendant about June 30, 1910; and that defendant had not paid plaintiff, as beneficiary, the amount of the benefit certificate (\$2,000), but refused to do so.

Defendant filed the general issue and three special pleas. The first and second special pleas averred that plaintiff's only cause of action set out in the declaration was founded upon the alleged contract of insurance, which was made up of a benefit certificate, an application for membership, and the by-laws of the association; that the insured, Anna S. Nyman, agreed and warranted that the answers to the questions in said application made by her were true; that she agreed such answers should form a part of the contract of insurance; that in and by the said benefit certificate it was agreed that the warranties were part of the contract, and the certificate was issued in reliance upon the warranties in the application and the truth of the answers therein contained. The first special plea avers the application of Anna S. Nyman to defendant was made April 11, 1910, and that in said application she was asked the question, "Are you in good health?" to which she answered, "Yes." The plea avers that said answer was untrue, and that said Anna S. Nyman was not then in good health, but was, at that time, afflicted with Bright's disease and other sickness, by reason of which the contract of insurance was void and of no effect. The second special plea avers that in her application Anna S. Nyman was asked, "When were you last attended by a physician?" to which question she answered, "About two years." The plea concludes substantially as the first special plea. The third special plea avers that the benefit certificate contained, among other things the provision: "This certificate to take effect and be in force only on the day received by the member and on condition that she then be in good health." The plea avers that on the date of the delivery of the certificate Anna S. Nyman was afflicted with, and was then being treated for, a fatal malady or disease known as Bright's disease; that said Anna S. Nyman knew she was not in good health; and that the defendant association did not learn of that fact until after

her death. Copies of the application were filed with and made part of the special pleas.

Plaintiff filed replications to the first and second pleas, averring that the answers to the questions set out in said pleas were true and to the third plea, that Anna S. Nyman was in good health when the certificate was received by her, and was not suffering from the malady known as Bright's disease. A trial by jury resulted in a verdict and judgment in favor of plaintiff for the amount of the certificate, with interest thereon. On appeal by defendant to the Appellate Court for the Second District, the judgment was affirmed, and the record is brought to this court for review by writ of certiorari.

At the conclusion of all the evidence defendant moved the trial court to direct a verdict in its favor. The action of the court in overruling this motion and in giving one instruction for plaintiff are the questions raised upon the record in this court.

[1] Defendant insists the evidence shows that the statements of Anna S. Nyman in her application that she was in good health and that it had been two years since she was last attended by a physician were false; also that, when the certificate was delivered to said Anna S. Nyman April 19, 1910, she was fatally ill with Bright's disease; that she knew she was so afflicted; and that defendant did not know it until after her death. Whether the answers made to the questions in the application for the certificate were true or false, and whether the insured was afflicted with Bright's disease when the certificate was delivered to her, were by the pleadings made issues of fact to be determined from the evidence. The error assigned on the refusal of the instruction to direct a verdict for defendant renders necessary an examination of the evidence.

The application for the certificate was made April 11, 1910, and recites that Anna S. Nyman is by occupation a housewife; that she is forty-five years old; and that the beneficiary named in the certificate is her son. It further recites that the declarations in the application were made and signed by the applicant in the presence of the medical examiner of defendant. In answer to questions in said application, the applicant stated she was in good health and was last attended by a physician about two years before. The medical examiner of defendant in his report stated that, after a physical examination of the applicant and chemical examination of urine, he found her pulse 72 and regular; temperature 98 2/5; height 5 feet 7 inches; weight 127 pounds; chest measurement 32; expiration 30; inspiration 34; and that upon examination of the urine the reaction was acid, specific gravity 10.20, and that there was no albumen or sugar. The medical examiner stated the applicant was a first-class risk. This examination was made April 11, 1910. Thereafter the certificate was issued, and on the 19th of April, 1910, it was delivered by a repre-

sentative of defendant to Anna S. Nyman. On that day she consulted Dr. Hanson at his office. The doctor testified he found her suffering from gastritis, catarrh of the stomach, and dropsy or swelling of the legs, also from an accumulation of water in the abdominal cavity. At that time the doctor did not examine her urine, but did examine it the 21st of April. He found it to contain albumen, and diagnosed her principal trouble as Bright's disease. He testified it would be difficult to tell how long she had been so afflicted, but the disease was in a chronic form, and might have existed two or three months, or probably longer. He testified it must have existed at least two months or more. He treated Mrs. Nyman until the 18th or 19th of May, during which time he saw her almost every day, made several examinations of the urine, and testified she was suffering from Bright's disease during all that period. Dr. Fitch examined her on May 20th and 23d. In his affidavit accompanying the proofs of death, he stated she had Bright's disease, and that its duration, from the history given him, was two or three months. Dr. Kimball was called to see Mrs. Nyman June 8th, and visited her six or eight times between that time and her death, which occurred June 22d. He diagnosed her trouble as Bright's disease, and said her condition was hopeless, and she was near the end when he first saw her. He testified the cause of her death was Bright's disease. In his sworn certificate accompanying the proofs of death, he gave the duration of the disease as two or three months.

According to the medical testimony, there are two forms of Bright's disease—acute and chronic. The acute form usually follows some infectious or other disease, and is not of long duration. The chronic form is not of sudden development, and may continue over a considerable period of time. Both parties on the trial introduced medical witnesses to whom they propounded hypothetical questions. The questions to defendant's witnesses embraced the symptoms and conditions of Mrs. Nyman testified to by Dr. Hanson as existing on the 19th of April, and the symptoms and conditions described by Drs. Fitch and Kimball as existing subsequently and up to the time of her death. Assuming those conditions to have existed, the medical witnesses testified that, in their opinion, Mrs. Nyman had Bright's disease on the 19th day of April and prior thereto. The hypothetical questions asked plaintiff's medical witnesses embraced the statements made as to the physical condition of Mrs. Nyman in the report of the medical examiner, and, upon the assumption her condition was as reported by said medical examiner, the witnesses gave it as their opinion that she was in good health on the 11th day of April, 1910, and was not afflicted with Bright's disease on the 19th day of said month.

The proof shows that Mrs. Nyman died from chronic Bright's disease June 22, 1910. According to the medical examiner's

report, she was not afflicted with the disease on the 11th of April. According to the testimony of Dr. Hanson and some other medical witnesses, it had existed for some time prior to April 19th. To this extent there was a conflict in the evidence as to the condition of Mrs. Nyman's health on the 11th day of April. Upon the issue made by the second special plea, Dr. Hanson testified Mrs. Nyman told him, when she called at his office April 19th, that she had previously consulted Dr. Nyman. He did not state she mentioned any time nor whether it was within two years prior to April 11th. Dr. Nyman testified he had visited Mrs. Nyman once. He could not give the date, but thought it was within two months of her death. Plaintiff testified that Dr. Nyman visited his mother June 16th or 18th. The court did not err in submitting to the jury the issues made by the first and second special pleas. *Union Bridge Co. vs. Teehan*, 190 Ill. 374, 60 N. E. 533; *Chicago & Northwestern Railway Co. vs. Dunleavy*, 129 Ill. 132, 22 N. E. 15; *Boyce vs. Tallerman*, 183 Ill. 115, 55 N. E. 703.

[2] The most serious question is resented by the issue made by the third special plea. We have above referred to the substance of the testimony offered in support of and in opposition to that plea. The plea was abundantly sustained by the proof offered by defendant. No one testified to personal knowledge of the condition of health of Mrs. Nyman on April 19th, except Dr. Hanson. The testimony of Drs. Fitch and Kimball tends to corroborate his testimony that she was on that day afflicted with Bright's disease. If there was no evidence fairly tending to contradict defendant's proof upon that issue, the court should have directed a verdict for defendant. If there was evidence legitimately tending to rebut the plea, then the issue should have been submitted to the jury. Plaintiff contends that the medical examiner's report made on the 11th day of April tends to rebut defendant's testimony that Mrs. Nyman was not in good health when the certificate was delivered to her April 19th. This contention is based upon the theory that the medical examiner's report shows her to have been in good health April 11th, and that it is a legitimate inference she did not have Bright's disease on April 19th. It is true the medical examiner's report tended to show Mrs. Nyman was in good health April 11th, but, under the conditions of this record, it would be carrying the inference too far to say it tended to show her condition on the 19th. The proof is direct and positive that on the last-named date she was not in good health, and that two months and three days later she died from the disease the proof showed she was suffering from on that day. If there had been no proof of the condition of Mrs. Nyman's health on the day the certificate was delivered, then there would be some force in plaintiff's contention that the inference might be indulged that, if she was in good health on

April 11th, she so continued until the 19th. But no such inference can be indulged, when the uncontradicted proof shows she was in bad health the day the certificate was delivered and so continued until her death. Defendant proved its third special plea, and, in our opinion, plaintiff offered no evidence that legitimately tended to rebut defendant's evidence. The trial court therefore erred in refusing to direct a verdict in favor of defendant under the issue made by the third special plea. Libby, McNeill & Libby vs. Cook, 222 Ill. 206, 78 N. E. 599

We are referred to Rhode vs. Metropolitan Life Ins. Co., 129 Mich. 112, 88 N. E. 400. The policy sued on in that case contains a provision that the company should not be liable unless the insured was alive and in good health when the policy was delivered and the premium paid and accepted by the company. In the opinion the court said there was proof strongly tending to show that the insured was afflicted with pulmonary consumption at the time the policy was delivered. The medical examiner's report appears to have been offered in evidence by plaintiff, and its competency was objected to by defendant. The court held it was competent, and that it authorized submission of the issue to the jury. We do not agree with that decision, and are not disposed to follow it.

[3] It is further insisted by plaintiff that defendant, by accepting and retaining premiums or assessments from the insured, is estopped from denying the validity of the certificate. The first premium was paid on the day the policy was delivered, and the last one two days before the insured's death. There is no proof whatever that defendant or its agent knew, before the death of Mrs. Nyman, that, at the time the policy was delivered and the first premium paid, she was not in good health. Receiving premiums subsequently, with knowledge that she was then ill, could have no significance, if defendant was ignorant of the fact that the insured was in bad health when the policy was delivered and the first premium paid. If Mrs. Nyman had been in good health when she received the policy and paid the first premium, defendant would not have been justified in refusing to accept premiums if she afterwards became ill. The knowledge that would estop defendant from denying liability in this case must be knowledge that the insured was not in good health when the policy was delivered.

[4] The third instruction given on behalf of plaintiff, after reciting what was necessary for plaintiff to prove in the first instance in order to warrant a recovery, told the jury that, if such proof had been made, then the verdict should be for plaintiff, provided the jury further believed that Mrs. Nyman was in good health at the time she made application for the insurance and at the time she received the certificate. The instruction ignored the issue made by the second special plea as to whether Mrs.

Nyman's statement in her application was true that she was last attended by a physician about two years before. The fact that the plea was not sustained by the weight or preponderance of the evidence did not justify ignoring the issue. If there was any evidence fairly tending to support the plea, the defendant was entitled to the benefit of it and to have it considered by the jury. In the form the instruction was given, it was erroneous. For the errors indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

SUPREME COURT OF NEW YORK.
APPELLATE DIVISION. SECOND DEPARTMENT.

QUICK ET AL.

vs.

QUICK.*

INSURANCE—LIFE POLICY—BENEFICIARIES—“LEGAL REPRESENTATIVE.”

Plaintiff's application for life insurance recited that he was married, and, in answer to the question as to whom he designated to receive the proceeds of the insurance, he wrote the word “estate,” and left blank the answer to the next question calling for “his or her relationship to you,” whereupon a policy was issued payable to insured, if living on a specified future date, otherwise to his legal representatives. *Held*, that the words “legal representatives” meant insured's executors or administrators, and not his next of kin; and hence, he having willed the proceeds to a third person, they were payable to his executor for distribution to the legatee.

(For other cases, see Insurance, Cent. Dig. §§ 1459, 1460, 1466, 1485; Dec. Dig. § 583.)

(For other definitions, see Words and Phrases, vol. 5, pp. 4070-4079; vol. 8, p. 7704.)

Appeal from Special Term, Kings County.

Action by Henry F. Quick and another against Howard L. Quick, as executor of the estate of Clarence W. Quick, deceased. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Argued before Jenks, P. J., and Burr, Carr, Rich, and Stapleton, JJ.

William Liebermann, of Brooklyn, for Appellants.
Lewis C. Grover, of Brooklyn, for Respondent.

* Decision rendered, April 10, 1914. 147 N. Y. Supp. 149.

PER CURIAM.

Judgment affirmed, with costs, on the opinion of Mr. Justice Kelly at Special Term.

The opinion of Justice Kelly at Special Term is as follows:—

The insurance policy in this case is payable to Clarence W. Quick, * * * herein called the insured, on the 12th day of June, 1927, if the insured be then living, * * * or, upon * * * prior death of the insured, to the legal representatives of the insured. The policy bears date June 12, 1907. Under the terms of the policy, the right of revocation was reserved, and the insured had power to change the beneficiary named upon complying with the rules of the insurance company. On June 27, 1907, fifteen days after the issuance of the policy, Mr. Quick made his will, of which he appointed the defendant, his brother, the executor. By this will he gave to one Mary Ellen Quinn, wife of Robert Quinn, all moneys to become due under this insurance policy, as well as under other policies mentioned in the will, reciting his intention "that the said Mary Ellen Quinn should receive all moneys due under said policies, the same as if she were named beneficiary in said policies." All the rest, residue, and remainder of the property he gave, devised, and bequeathed to his wife, Emma Quick. He died May 17, 1912, leaving his widow and one son surviving him. He never changed the beneficiary named in the policy. The question at issue is whether the amount of the insurance should go to the widow and son, or to the executor, to be paid over to Mary Ellen Quinn, as directed by the will. What do the words "legal representatives of the insured" mean, when used in the policy with reference to the \$1,000 insurance money? Did the insured mean his next of kin, or his executors or administrators? As a general proposition, such words, used in a will with reference to personalty, mean executors or administrators, and that meaning will be attributed to them, unless there be facts to show that they were not used in the ordinary sense. *Griswold vs. Sawyer*, 125 N. Y. 411, 26 N. E. 464; *Sulz vs. M. R. L. Ass'n*, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379; *Leonard vs. Hartney*, 173 N. Y. 353, 66 N. E. 2. I think the facts in this case show clearly that the insured intended the money to go to his estate, and that the words must be interpreted in their ordinary sense. The application for insurance is in evidence signed by deceased. After answering the question whether he is single or married, he answers, "Married." The very next question is, "Whom do you designate to receive the proceeds, etc.?" and his answer is, "Estate," and it is significant that the next question, referring to beneficiary, "his or her relationship to you," is followed by a blank or dash. I think Mr. Quick meant that the policy should be administered by his executors, or by bequest in his will. He certainly had his wife and child in mind and deliberately used the word "estate." This is confirmed by his action

fifteen days later, when he specifically bequeaths this money to Mary Ellen Quinn. He lived for five years thereafter. I cannot judge his motives, or the propriety of his action. He is not here to explain them. I think the money goes to the executor. No costs.

SUPREME COURT OF PENNSYLVANIA.

FRANCIS

vs.

PRUDENTIAL INS. CO. OF AMERICA.*

1. INSURANCE — POLICY — EXTENDED INSURANCE — FORFEITURE.

Where a life insurance policy provided that if, at the end of five years, the policy should become forfeited, the company would write in lieu thereof, without any action of the insured, a paid-up policy for five years and seventy-eight days, and where, less than five years before his death and five years from the date of the policy, insured stopped paying premiums, a sum which he then owed the company for loans could not, in the absence of any provision therefor, reduce the duration of the extended insurance.

(For other cases, see Insurance, Cent. Dig. §§ 935, 938; Dec. Dig. § 367.)

2. INSURANCE—POLICY—CONSTRUCTION.

Ambiguous conditions in an insurance policy should be construed most strongly against the insurer.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

3. INSURANCE—POLICY—CONSTRUCTION—PRESUMPTION.

A life insurance policy in the language of the insurer is presumed to contain all conditions intended to be imposed.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

4. INSURANCE—ACTION ON POLICY—QUESTION FOR JURY.

Where, in an action on a life insurance policy, there was evidence that defendant, by depositing a properly addressed letter in the mail, had notified the insured of forfeiture of the policy, and plaintiff denied that the notice had been received, the question whether the notice was received was for the jury.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

Appeal from Court of Common Pleas, Allegheny County.
Assumpsit on a life insurance policy by Tannah Francis against the

* Decision rendered, Jan. 5, 1914. 90 Atl. Rep. 205.

Prudential Insurance Company of America. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before Fell, C. J., and Brown, Potter, Elkin, and Moschzisker, JJ.

John H. Scott, James T. McDonald, and Paul M. Sloan, all of Pittsburgh, for Appellant.

E. W. Arthur and W. S. Thomas, both of Pittsburgh, for Appellee.

The facts appear by the following opinion in the common pleas of Reid, J., sur defendant's motion for a new trial, and for judgment n. o. v. :—

"Plaintiff, the widow of Joseph M. Francis, sues to recover upon a policy of insurance issued by defendant on the life of her husband. The form of policy was known as the 'Annual Dividend Whole Life.' It bears date January 27, 1899, and provides for the payment of the sum of \$1,500 to the plaintiff, in the event of death of the assured. The premium thereon was to be paid in quarterly installments of \$13.04.

"Assured died May 20, 1909, and due proofs of death were prepared and tendered; but defendant, disclaiming liability, for the reasons hereinafter stated, declines to receive them.

"The policy in evidence, the original of which is annexed to plaintiff's declaration, contained (*inter alia*) the following provisions:—

" 'Privileges—Cash Loans.

" '[Here follows provision for loans to be based upon the table which is appended.]

" 'Paid-Up Life Policy or Extended Insurance.

" 'If this policy, after being in force full three years, shall lapse or become forfeited for the nonpayment of any premium or any note given for a premium or loan made in cash on such policy as security, or of any interest on such note or loan, it may be surrendered for a nonparticipating paid-up life policy as specified in the following table; provided the policy is legally surrendered to the company within three months after such lapse or forfeiture. If this policy, having lapsed or become forfeited as above, is not surrendered for a paid-up life policy, the company will write, in lieu of this policy, and without any action on the part of the insured, a nonparticipating paid-up term policy for the full amount insured by this policy, and to continue in force for the term indicated by the following table of extended insurance. The paid-up term policy shall provide, however, that, in case of the death of the insured within three years from the date of such lapse or forfeiture, there shall be deducted from the amount payable by the company the sum of all premiums that would have become due on this policy up to the time of the death of the insured if the policy had continued in force, and any

indebtedness due the company on this policy at the date of such lapse or forfeiture.'

"Table Above Referred To.

"The benefits stated in the following table apply to the original sum insured only. If the sum insured is increased by dividends or otherwise, the benefits will be increased; but any indebtedness placed on the policy will operate to reduce the benefits.

At End of.	Cash Loan.	Paid-Up Life Policy.	Extended Ins.	Cash Sur- render Value.
3 years	\$ 57	\$142	3 years 86 days	\$42
4 years	84	187	4 years 100 days	57
5 years	107	232	5 years 78 days	84

"Assured paid no premiums after January 27, 1904. His quarterly premium for April 27, 1904, became due, and, remaining unpaid, the policy not being surrendered, the foregoing provision as to automatic extension of insurance became effective, and, so far as the face of the policy is concerned, assured became entitled to the protection of the policy for five years and seventy-eight days thereafter, or to a period beyond the date of his death (May 20, 1909).

"But defendant contends that, by reason of the fact that on April 27, 1904, the assured was indebted to the company for loans advanced him on the policy, aggregating, less dividends, the sum of \$86.27, the period of extended insurance was, 'by actuarial computation,' reduced to three hundred and eight days, and terminated March 1, 1905, or almost four years before the date of death.

"The basis of this defense is thus stated in the affidavit of defense, and is an excellent résumé of the proposition: 'By actuarial computation the said Joseph M. Francis, on the 27th day of April, 1904, became entitled to extended insurance under the terms of said policy for a period of three hundred and eight days, * * * or until March 1, 1905; that being the term of extended insurance allowed under said policy by actuarial computation of the amount of the surrender value of the said policy, at the date of its lapse, and the debt and accumulated interest, that being the amount of extended insurance that could be purchased by the legal reserve for the policy.'

"Another defense is that, demand having been made by letter for repayment of the loan, the payment not having been made, the policy became forfeited and void under the following provisions in the loan certificate signed by assured when he became a borrower: 'That, if the said loan, with the accumulated interest, shall become equal to the legal reserve for the said policy, the

company may demand immediate payment of said loan, or any part thereof, with all interest accumulated and accrued thereon, and if the same be not paid to the company within thirty days after due notice by mail, or otherwise, the said policy shall become forfeited and void.'

"It is contended by defendant that this language is also to be read into the terms of the policy as to extended insurance, and the latter to be interpreted by the foregoing expressions as to the period 'when said loan, with accumulated interest, shall become equal to the legal reserve for said policy.'

"It was strenuously contended at the trial, and as strenuously now urged here, that the only rational interpretation of the clauses referred to is to the effect that it was the purpose and intention of the parties that only such amount of extended insurance should be allowed as the legal reserve would purchase, and that the five-year and seventy-eight-day period, specified in the table, must be disregarded accordingly.

"The court refused to allow the testimony of the actuary of the company as to the method of computation, and the result thus obtained in contradiction to the written language of the parties, to reduce the period of extended insurance to the point required by defendant's theory, and held that no part of the language of the policy or of the loan certificate was susceptible of such interpretation.

"The defense was accordingly limited to the question of the receipt, or nonreceipt, by assured of the letter notifying him of the demand for repayment of the loans, in default of which the policy would be forfeited.

"The jury found a verdict for plaintiff, allowing defendant credit for the amount of the loans, with interest; that being in accordance with the court's interpretation of the contract as to reduction of benefits by reason of indebtedness.

"Defendant moved for a new trial, and for judgment non obstante veredicto. We are now to consider these motions.

"It may be that the method proposed by the company to determine the value of extended insurance is an equitable one, and that it will be well, in future, to so write its policies as to provide for it; but we cannot read into a contract an elaborate system of scientific actuarial computations, unless it be so 'nominated in the bond.' No such contract can be found. Under the headline, 'Paid-Up Life Policy or Extended Insurance,' the only limitation upon the right of the assured to have a policy 'to continue in force for the term indicated by the following table of extended insurance' is that, in the event of any existing indebtedness, it shall be deducted before the payment of the amount of the policy.

"The clause following the line, 'Table Above Referred To,' which reads, 'if the sum insured be increased by dividends or

otherwise, the benefits will be increased, but any indebtedness placed on the policy will operate to reduce the benefits,' must be read in connection with the language quoted above, which applies to payment of debts at time of any policy falling due; and such deduction, by which the amount of the payment or 'benefit' is reduced, is the logical and natural result of the use of the terms.

"In the first place, the policy expressly and emphatically says that such extended insurance will be issued to continue in force for the term indicated, i. e., five years and seventy-eight days—not for such fractional part of five years and seventy-eight days as computation by actuary might show the reserve fund value, set apart for this particular policy, would purchase.

"Can the phrase 'reduction of benefits' be read to mean that the parties must submit the question of the extended term to an actuary and delve into the financial policy and accounting system of defendant before it can be known to what extended insurance the assured shall be entitled—notwithstanding the printed language carefully chosen by the company itself?

"The language of the loan certificates, instead of supporting the defendant's contention, is, if anything, a complete answer to its position. It is said that the terms of these documents must be read into the policy. So they must, to determine the rights of the parties as to loans and the penalties for noncompliance with the terms of these loans—but not to affect the portions of the policy not otherwise involved. Thus the language that, 'if the loan, with accumulated interest, shall become equal to the legal reserve for said policy, the company may demand immediate payment,' surely cannot mean that the applicant thereby agrees that the previous positive period fixed as that of extended insurance shall by such a collateral agreement, be entirely changed, and a new system agreed upon to determine his rights as to such extended insurance. True, this provision may be the beginning of a process of entirely terminating all of the rights of the assured; but it is not the beginning of a new contract to thereafter govern the policy and the parties—save as a measure in *terrorem*. It provides a penalty, is in itself a complete remedy in case of default; but that very fact, and the careful preparation of such means of action, outside the terms of the policy, clearly indicate the purpose that it shall have no further effect.

"If there be an ambiguity in the terms of this policy, it must be construed most favorably to the beneficiary; the language of *Smith vs. Life Insurance Co.*, 103 Pa. 177, 49 Am. Rep. 121, being: 'A condition in a policy of insurance, being the language of the company, must, if there be any ambiguity in it, be taken most strongly against them; if reasonably susceptible of two interpretations, it is to be construed in favor of the assured, so as

not to defeat, without plain necessity, his claim to indemnity, which it was his object to secure.'

"We have not overlooked the able brief of defendant's counsel. We are not convinced, however, by any of the authorities of other jurisdictions, that we have committed error. *Taylor vs. N. Y. Life Ins. Co.*, 197 N. Y. 324, 90 N. E. 964, and *Ferry vs. Prudential Ins. Co.*, 144 App. Div. 780, 129 N. Y. Supp. 751, are clearly distinguishable from the case before us.

"In the *Taylor Case* a note was given, and this, in connection with the insurance law of the state of New York, was read into the policy. In the *Perry Case* there was a specific agreement in the loan certificate that 'the amount of the said loan should operate "to reduce the term of extended insurance * * * in accordance with the rules of the company."

"In the case at bar, so far from embodying any such provisions, there is no reference whatever to the rules of the company as to computing extended insurance, and only a clause already quoted and considered, authorizing forfeiture if, when the loan and accumulated interest shall become equal to the legal reserve, the assured fails to pay up at once, on demand.

"As to the second branch of the defense, the question of whether the notice of demand which would warrant the forfeiture under the fifth clause of the loan certificate was received by defendant was fully and fairly submitted to the jury. It was a question of fact. The credibility of the witnesses and the inferences to be drawn from facts were for them. It is not every close case that is to be ruled by the court as against the determination of the jury. There must have been no evidence, or in any event not more than a scintilla, to warrant the court in interfering. We cannot say that such was the fact here. Forfeitures are not favorites of the law. This notice was intended to work a forfeiture. If it reached its destination, and was delivered, plaintiff's rights were at an end. The jury found it did not reach the assured, and he therefore had no notice of forfeiture. We cannot interfere.

"The motion for new trial is refused, and the rule for judgment non obstante veredicto must be discharged."

ELKIN, J.

[1] Learned counsel for appellant contend that, by the plain and unambiguous terms of the policy in suit, the indebtedness to the company at the time of lapse operated to reduce the term of extended insurance; and fifty pages of printed argument are devoted to a discussion of those provisions which are said to be so clear and unambiguous. If the construction insisted upon by appellant were so clear as its counsel seem to think, it would not be necessary to resort to such a labored argument to justify the conclusion. We have carefully read this argument without being convinced that the indebtedness to the company at the time of

the lapse operated to reduce the term of extended insurance, or that the plain and unambiguous terms of the policy mean anything of the kind. The controversy arises under the following clause of the policy: "If this policy, having lapsed or become forfeited as above, is not surrendered for a paid-up policy, the company will write in lieu of this policy, and without any action on the part of the insured, a nonparticipating paid-up term policy for the full amount insured by this policy, and to continue in force for the term indicated by the following table of extended insurance." The table referred to shows that at the end of five years, the premiums having been paid during that period, and the policy remaining in force at that time, the insured is entitled to extended insurance under the policy for an additional term of five years and seventy-eight days. This all appears in the plain and unequivocal terms of the policy itself. What is meant by the policy in this respect is not left to conjecture, or for subsequent interpretation, but is clearly expressed in the plainest kind of language, so that he who runs may read and know. Indeed, if it were not for the very able and ingenious argument of learned counsel for appellant, we would think it impossible to give a substantial reason for holding that the policy does not mean what its language so clearly expresses. It is argued, earnestly and forcefully, that the insured was only entitled to an extended term of five years and seventy-eight days on condition of his being free from indebtedness to the company on account of the policy at the date of the lapse. The answer to this contention is that the policy contains no such provision, and in order to reach such a conclusion it is necessary, not only to ignore the plain words of the contract, but to read into it by way of construction the ex parte understanding of the insurer, without anything in the policy to indicate what that understanding was, and without notice to the insured that the true intent of the parties was not fully expressed in the clear language of their contract. If the plain and unambiguous terms of the contract in the present case mean anything, it is as held by the learned court below, that the insured was entitled to an extended term of five years and seventy-eight days. This is what is expressly provided in the table of extended insurance, and we can find no warrant for denying the insured and his beneficiaries the full benefits of his policy.

[2] It has been uniformly held in our state that, if there be ambiguity in the conditions of a policy of insurance, those conditions are to be taken most strongly against the insurer and in favor of the insured. *Smith vs. Life Insurance Co.*, 103 Pa. 177, 49 Am. Rep. 121. The application of this well-established rule to the facts of the present case is a sufficient answer to the argument of appellant as to the proper construction of the policy in question here.

[3] We cannot agree that the term of extended insurance is

affected by the loan provisions of the policy, which do not in terms, nor as we view it by necessary implication, have reference to the table of extended insurance. If appellant intended to reduce the term of extended insurance on account of loans to the insured, it would have been an easy matter to have so provided in the policy, and the inference from its failure to do so is that it did not so intend. The policy is in the language of the insurance company, and the presumption is that its express provisions contain all the conditions intended to be imposed. Certainly the insured had the right to assume that the policy meant what it said, and that conditions not expressed did not exist. As to the loans appellant safeguarded its interests by provisions for forfeiture, and for the deduction of indebtedness, together with interest accumulated and accrued upon payment of the amount otherwise due the insured under the terms of the policy. There is no provision in the policy for the reduction of the terms of extended insurance on account of indebtedness to the insurer, and, in the absence of such a provision, courts are not at liberty to read into the contract what it does not contain. Again, the rule that insurance contracts shall be taken most strongly against the insurer applies, and, when the provisions as to loans are read in the light of this rule, the argument of appellant on this branch of the case fails.

[4] The second contention of appellant is that the learned court below erred in submitting to the jury the question of fact as to whether notice of forfeiture was received by the insured. It is not denied that this under proper circumstances was a question of fact for the jury; but it is argued that the evidence was not sufficient to overcome the presumption that a letter properly addressed and deposited in the mail was received by the addressee. The notice contained in the letter was intended to work a forfeiture, and, if it reached its destination and was delivered, it would have this effect. It was denied that the notice was ever received, and this was the question submitted to the jury. It is contended for appellant that the evidence to show that no such notice was received amounted only to a scintilla, and that the court should have disregarded it by directing a verdict for the defendant. The evidence cannot be regarded as amounting only to a scintilla, and, under all the circumstances, we feel that the case is not so clear on its facts as to warrant its withdrawal from the jury. It may be considered a close case, and therefore doubtful on this particular branch of it; but cases doubtful on their facts, or the inferences to be drawn therefrom, are as a rule for the jury, and not for the court. Our conclusion is that the submission of this question of fact to the jury does not constitute reversible error.

The case was very carefully tried in the court below, and

was submitted to the jury with fair and impartial instructions on the disputed question of fact. We entirely agree with the views expressed by the learned trial judge as to the construction of the contract of insurance. The case might very well be rested on the opinion of the learned court below in refusing the motion for judgment non obstante veredicto. The opinion covers every branch of the case, and shows careful and exhaustive consideration of the questions involved. The conclusion reached is so clearly right as to make further discussion unnecessary.

Judgment affirmed.



PATTERSON *vs.* EQUITABLE LIFE ASSUR. SOCIETY.*
(Supreme Court of Arkansas.)

1. INSURANCE—LIFE INSURANCE—WAIVER.

Where a life policy provided for numerous alternatives in case of lapse for default in payment of premiums, letters written by the insurer after the death of the insured, who had defaulted in his premiums, informing him that unless a loan secured by the policy was paid, it would be entered upon its records as a purchased policy and the cash value applied to the discharge of the loan, and that for nonpayment this had been done, do not establish a waiver of the forfeiture and show the policy to have been in full force up to the death of the insured.

(For other cases, see Insurance, Cent. Dig. §§ 1026, 1027, 1030, 1035, 1040, 1057; Dec. Dig. § 388.)

2. INSURANCE—LIFE INSURANCE—WAIVER.

Where the insured defaulted in the payment of premiums, the rights of his beneficiary became fixed upon his death, and a forfeiture of the policy is not waived by letters written to the insured by the insurer, in ignorance of his death.

(For other cases, see Insurance, Cent. Dig. §§ 1026, 1027, 1030, 1035, 1040, 1057; Dec. Dig. § 388.)

3. INSURANCE—LIFE INSURANCE—FORFEITURE OF POLICY—ACTION.

Where an insurance policy expressly provided that upon nonpayment of premiums the policy should be forfeited, except that certain rights might be preserved to insured some of them dependent upon his taking action, the insurer need take no affirmative action to forfeit the policy.

(For other cases, see Insurance, Cent. Dig. §§ 703, 761, 780, 826, 840, 904; Dec. Dig. § 310.)

Appeal from Circuit Court, Howard County; Jeff. T. Cowling, Judge.

* Decision rendered, March 23, 1914. 165 S. W. Rep. 454.

Action by Emma L. Patterson against the Equitable Life Assurance Society. From the judgment, plaintiff appeals. Affirmed.

W. C. Rodgers, of Nashville, for Appellant.
Alexander & Green, of New York City, and Rose, Hemingway, Cantrell & Louighborough, of Little Rock, for Appellee.



NATIONAL COUNCIL OF JUNIOR ORDER OF UNITED
AMERICAN MECHANICS ET AL. *vs.* CARAWAY.

(No. 1,490.)*

(Court of Appeals of Georgia.)

INSURANCE—FUNERAL BENEFIT—FORFEITURE—WAIVER—
PAYMENT OF DUES—SUFFICIENCY OF EVIDENCE.

The trial judge, sitting as trior of both law and facts, was authorized to find, under the agreed statement of facts, that the defendant beneficial association had waived the forfeiture which would have resulted from the nonpayment of arrearages of dues; or he was authorized to find that there were no arrearages of dues which would defeat the plaintiff's right to funeral benefits. The judgment was authorized upon either ground, especially by reason of the fact, at the time the member of the organization in question died, his dues had been paid and received for in full to a date subsequent to his death, and the association which had accepted these dues retained them without any offer to return them.

(For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.)
Powell, J., dissenting.

Error from City Court of Atlanta; H. M. Reid, Judge.
Action by S. W. D. Caraway against the National Council of Junior Order of United American Mechanics and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Walter McElreath, of Atlanta, for Plaintiffs in Error.
Edgar Latham, of Atlanta, for Defendant in Error.

* 81 S. E. Rep. 243. Syllabus by the Court.

DUENSER *vs.* SUPREME COUNCIL OF ROYAL ARCANUM.*

(Supreme Court of Illinois.)

1. INSURANCE—MUTUAL BENEFIT INSURANCE—PERSONS WHO MAY BE BENEFICIARY—“DEPENDENT.”

A woman who contracted a bigamous and void marriage with a member of a benefit insurance society, with knowledge that he had a living wife, was not “dependent” upon him, within the meaning of provisions of the constitution and by-laws of such society, providing for the payment of benefits to persons dependent upon the member for maintenance, since she could not have compelled him to support her, especially where the certificate was issued and payment made to her after the member's death as his wife, and not as a person dependent upon him, and no evidence of dependence was given or required at the time of the issuance of the certificate or at the time of payment, as required by the rules of the society, where the beneficiary was a person dependent upon the member, and hence, under a provision of the by-laws that, if the designation of a beneficiary failed for any reason, the benefit should be payable to certain persons of whom his wife was given preference, the benefit was payable to the member's lawful wife.

(For other cases, see Insurance, Cent. Dig. §§ 1942, 1943; Dec. Dig. § 776.)

(For other definitions, see Words and Phrases, vol. 2, pp. 1991-1993.)

2. MARRIAGE—VALIDITY—PREVIOUS EXISTING MARRIAGE.

A marriage was bigamous and void, where the man then had a living wife, and the woman did not become his legal wife.

(For other cases, see Marriage, Cent. Dig. § 30; Dec. Dig. § 11.)

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; Charles M. Walker, Judge.

Action by Sophia Duenser, administratrix, against the Supreme Council of the Royal Arcanum. A judgment for plaintiff was reversed by the Appellate Court, First District (178 Ill. App. 648), and plaintiff appeals. Reversed, and judgment of the circuit court affirmed.

Tinsman & Blocki and Rankin, Howard & Donnelly, of Chicago, for Appellant.

Musgrave, Oppenheim & Lee, of Chicago (George H. Miller, of Chicago, of counsel), for Appellee.

* Decision rendered, Feb. 21, 1914. Rehearing denied, April 14, 1914. 104 N. E. Rep. 801.

MODERN BROTHERHOOD OF AMERICA vs. MATKOVITCH ET AL. (No. 8,288.)*
 (Appellate Court of Indiana, Division No. 1.)

1. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—DESIGNATION OF PARTIES.

Where the names of all the parties to an action are given in the body of an assignment of errors, it is sufficient, notwithstanding the erroneous form of the caption.

(For other cases, see Appeal and Error, Cent. Dig. §§ 2990-2996; Dec. Dig. § 722.)

2. INSURANCE—MUTUAL BENEFIT INSURANCE—CHANGE OF BENEFICIARY.

While the insured, under a mutual benefit certificate, can change the beneficiary, but as a general rule it must be done in the mode prescribed, yet equity will aid imperfect changes and will consider that done which ought to have been done and never require impossibilities.

(For other cases, see Insurance, Cent. Dig. §§ 1950-1954; Dec. Dig. § 784.)

3. INSURANCE—MUTUAL BENEFIT INSURANCE—CHANGE OF BENEFICIARY.

The rights of the beneficiary in a mutual benefit certificate are subject to the right of the insured to change the beneficiary in the manner prescribed in the by-laws or the certificate.

(For other cases, see Insurance, Cent. Dig. § 1948; Dec. Dig. § 782.)

4. INSURANCE—MUTUAL BENEFIT INSURANCE—CHANGE OF BENEFICIARY—MODE OF CHANGING DESIGNATION.

Where insured, under a mutual benefit certificate, was prevented from changing the beneficiary thereunder in the mode prescribed in the certificate and by-laws by the wrongful withholding of the certificate by the beneficiary, but, under the circumstances, she did all she could to effect the change, equity will regard the change as made.

(For other cases, see Insurance, Cent. Dig. §§ 1950-1954; Dec. Dig. § 784.)

5. INSURANCE—MUTUAL BENEFIT INSURANCE—CHANGE OF BENEFICIARY—CHANGE BY WILL.

An insured, under a mutual benefit certificate, cannot change the beneficiary by the execution of a will, unless there is some other fact in aid of the will.

(For other cases, see Insurance, Cent. Dig. §§ 1950-1954; Dec. Dig. § 784.)

Appeal from Superior Court, Lake County; Virgil Reiter, Judge.

Action by the Modern Brotherhood of America to compel Louis Grahovac to interplead with George Matkovitch and others as to the proceeds of a mutual benefit certificate. From a judgment for defendant Grahovac, defendants Matkovitch and others appeal. Reversed, with directions.

James W. Brissey, of Indiana Harbor, for Appellant.

J. A. Patterson, of Indiana Harbor, and C. E. Greenwald, of Whiting, for Appellee.

* Decision rendered, April 2, 1914. N. E. Rep. 795.

**RED MEN'S FRATERNAL ACCIDENT INS. CO vs. RIPPEY. (No. 22,528.)*
(Supreme Court of Indiana.)**

I. INSURANCE—MUTUAL BENEFIT INSURANCE—ACTIONS—ISSUES.

In an action on a beneficiary insurance certificate which expressly provided against liability for death from tuberculosis within one year, a defense that tuberculosis was the cause of the death involved no issue of forfeiture, as a right must exist before it can be forfeited, and there was never any insurance against death from that cause within a year.

(For other cases, see Insurance, Cent. Dig. §§ 1996-1998; Dec. Dig. § 815.)

2. APPEAL AND ERROR—HARMLESS ERROR—BURDEN TO SHOW EFFECT OF ERROR.

In an action on a benefit insurance certificate expressly providing against liability for death from tuberculosis within one year, an erroneous instruction authorizing a recovery for such a death required a reversal of a judgment for plaintiff, though the evidence was not in the record, as it was plaintiff's duty to bring up the evidence if it would show that death was due to some other cause and that the error was harmless.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.)

On petition for rehearing. Overruled.
For former opinion, see 103 N. E. 345.

* Decision rendered, April 3, 1914. 104 N. E. Rep. 641.



**HOUSE vs. MODERN WOODMEN OF AMERICA.*
(Supreme Court of Iowa.)**

INSURANCE — MUTUAL BENEFIT INSURANCE — CHANGE IN BY-LAWS.

Where a benefit certificate issued by a fraternal insurer reserved the right to amend the by-laws exempting the insurer from liability for accidents directly traceable to certain extra hazardous occupations, an amendment to the by-laws, which included as an extra hazardous occupation that of an electric lineman, is valid as to one already a member, and there can be no recovery for his death from an accident while employed as an electric lineman, which occupation he took up after the amendment.

(For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.)
Weaver, J., dissenting.

* Decision rendered, April 14, 1914. 146 N. W. Rep. 817.

Appeal from District Court, Hamilton County; C. G. Lee, Judge. Action upon a benefit certificate for \$1,000 of insurance issued by the defendant as a fraternal beneficiary society. Plaintiff filed a demurrer to the defendant's answer, which was sustained. The defendant refusing to plead over, a judgment for plaintiff was entered as prayed. The defendant appeals. Reversed and remanded.

Truman Plantz and Geo. C. Perrin, both of Rock Island, Ill., and A. N. Boeye, of Webster City, for Appellant.

G. F. Tucker and Wesley Martin, both of Webster City, for Appellee.

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FINCH *vs.* BOND ET AL.*
(Court of Appeals of Kentucky.)

1. INSURANCE—FRATERNAL BENEFIT INSURANCE—"FRATERNAL SOCIETY"—"PAYMENT OF COMMISSION OR EMPLOYMENT OF AGENT."

The fact that a fraternal benefit association offered to its members only a small prize or compensation for procuring new applications for membership was not a "payment of commissions or employment of agents" within Ky. St. § 679, as amended by Acts 1906, c. 141, providing that the section shall not apply to fraternal societies which secure members through the lodge system exclusively, and pay no commission and employ no agents except in organizing local lodges, so as to prevent the association from being a fraternal society.

(For other cases, see Insurance, Cent. Dig. § 1824; Dec. Dig. § 687.)

(For other definitions, see Words and Phrases, vol. 3, pp. 2942, 2943.)

2. INSURANCE—FRATERNAL BENEFIT INSURANCE—BENEFICIARIES—"DEPENDENT."

While a creditor has an insurable interest in his debtor's life, he is not merely, by reason of the relationship of debtor and creditor, a "dependent" upon insured so as to permit the creditor to be properly described by that word in a mutual benefit certificate.

(For other cases, see Insurance, Cent. Dig. § 1939; Dec. Dig. § 773.)

Appeal from Circuit Court, Fulton County.

Action by Susan A. Finch, in which Florence A. Bond and others intervene. From a judgment for intervenors, plaintiff appeals. Affirmed.

Herschel T. Smith, of Fulton, for Appellant.

Thomas & Webb, of Mayfield, and H. N. Moon, of Memphis, Tenn., for Appellees.

* Decision rendered, April 15, 1914. 165 S. W. Rep. 400.

CLARK vs. NORTH AMERICAN UNION.*

(Supreme Court of Michigan.)

1. INSURANCE—LIFE INSURANCE—QUESTIONS BY MEDICAL EXAMINER—EVIDENCE.

Relative to a false answer in a medical examiner's blank not avoiding a policy, though the blank warranting the answers therein, was signed by applicant, sufficient doubt to require submission to the jury as to whether the question, Was she pregnant? was asked applicant is raised, in an action for the death benefit by the examiner's testimony that he was unable to say whether he asked her the question, and that he does not ask all the questions in the blank.

(For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.)

2. INSURANCE—CONTRACT—RULES.

The rule of a fraternal benefit society, that medical examiners shall reject a pregnant female applicant for membership, unless she signs a waiver of claims resulting from such condition, need not be in writing nor promulgated, to be within its rules, subject to all of which the application is, in terms, made.

(For other cases, see Insurance, Cent. Dig. § 1854; Dec. Dig. § 718.)

3. INSURANCE—WAIVER OF FORFEITURE.

The doctrine of waiver of forfeiture of the policy has no application, where, on the death of a member, the society's president advised the beneficiary that the claim was rejected, but that, under its laws, he had a right to appeal to its executive committee, which would meet at a certain place, on a certain day of each month, though on his going there on such day of the succeeding month no one appeared.

(For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.)

Error to Circuit Court, Muskegon County; Joseph Barton, Judge.

Action by Fred A. Clark against the North American Union. Judgment for defendant, and plaintiff brings error. Reversed, and new trial granted.

Argued before Steere, C. J., and Moore, McAlvay, Brooke, Kuhn, Stone, Ostrander, and Bird, JJ.

Turner & Turner, of Muskegon, for Appellant.

Cross, Vanderwerp, Foote & Ross, of Muskegon (Robert S. Iles, of Muskegon, of counsel), for Appellee.

* Decision rendered, March 26, 1914. 146 N. W. Rep. 336.

KIRCHBERG *vs.* UNION TRUST CO.*
 (Supreme Court of Michigan.)

INSURANCE—LIFE INSURANCE—ACTION—SUFFICIENCY OF EVIDENCE.

Evidence, in a suit involving possession of a life insurance policy claimed by complainant by an assignment from his father, held to sustain a finding that the signature of assignor was not a forgery, and that the assignment was genuine.

(For other cases, see Insurance, Cent. Dig. §§ 481, 482; Dec. Dig. § 212.)

Appeal from Circuit Court, Wayne County, in Chancery; Henry A. Mandell, Judge.

Action by William M. Kirchberg against the Union Trust Company, special administrator of the estate of Christian Kirchberg, deceased. From a decree for plaintiff, defendant appeals. Affirmed.

Argued before McAlvay, C. J., and Moore, Brooke, Kuhn, Stone, Ostrander, Bird, and Steere, JJ.

Frederic T. Harward, of Detroit, for Appellant.
 O. E. Angstman, of Detroit (Alfred Lucking of Detroit, of counsel), for Appellee.

* Decision rendered, March 27, 1914. 146 N. W. Rep. 269.



ROYAL NEIGHBORS OF AMERICA *vs.* LAUFMAN.*
 (Court of Appeals of Kentucky.)

1. INSURANCE — MUTUAL BENEFIT INSURANCE — SUFFICIENCY OF EVIDENCE—PAYMENT OF ASSESSMENTS.

In an action upon a death benefit certificate issued by a fraternal order, where the defense was suspension for nonpayment of assessments, evidence held sufficient to take to the jury the question whether the assessment had been paid before the expiration of the time for payment.

(For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.)

2. APPEAL AND ERROR — REVIEW — VERDICT OF JURY — WEIGHT OF EVIDENCE.

The weight of the evidence is a question for the jury, and the court of appeals cannot pass on the question whether the evidence is convincing, satisfactory, or sufficient, but only whether there is any evidence to sustain a verdict.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.)

* Decision rendered, March 27, 1914. 164 S. W. Rep. 966.

3. APPEAL AND ERROR—HARMLESS ERROR—ERROR FAVORABLE TO APPELLANT.

An appellant cannot complain of error in an instruction which is favorable to him.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.)

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by William A. Laufman against the Royal Neighbors of America. Judgment for plaintiff, and defendant appeals. Affirmed.

Samuel W. Greene and W. A. Screechfield, both of Louisville, for Appellant.

William P. McDonough and L. C. Heck, Jr., both of Louisville, for Appellee.



METROPOLITAN LIFE INS. CO. vs. CLAY, INS. COM'R.*
(Court of Appeals of Kentucky.)

1. INSURANCE — NONFORFEITURE ACTS — APPLICATION TO FOREIGN INSURANCE COMPANIES.

Ky. Nonforfeiture Acts (Acts 1891-93, c. 171, § 122; Acts 1891-93, c. 243; Ky. St. 1894, § 659), providing for paid-up insurance and giving policies a cash surrender value, though applying in terms only to domestic corporations, are binding on foreign corporations, in view of Const. § 202, providing that foreign corporations may not transact business on more favorable terms than domestic.

(For other cases, see Insurance, Cent. Dig. § 12; Dec. Dig. § 17.)

2. INSURANCE — INDUSTRIAL POLICIES — CASH SURRENDER VALUE—LIMITATIONS.

Under Ky. Nonforfeiture Act of April 5, 1893 (Acts 1891-93, c. 171, § 122), providing that industrial insurance on which the weekly premiums are not more than fifty cents shall have a cash surrender value after payment of two full premiums, a demand for the cash surrender value is governed by the five-year statute of limitations; the act fixing no time for demand.

(For other cases, see Insurance, Cent. Dig. §§ 937, 938; Dec. Dig. § 369.)

3. INSURANCE—INDUSTRIAL INSURANCE—CASH SURRENDER VALUE—TIME FOR DEMAND.

Under Ky. Nonforfeiture Act of July 1, 1893 (Act 1891-93, c. 243; Ky. St. § 659), providing that policies of industrial insurance, on which the weekly premiums are not more than fifty cents, should not be forfeited after payment of five premiums, and requiring demand for paid-up insurance to be made within eight weeks, the time for the demand for the cash surrender value not being fixed by the act, will be fixed at eight weeks by analogy to paid-up insurance.

(For other cases, see Insurance, Cent. Dig. §§ 937, 938; Dec. Dig. § 369.)

* Decision rendered, March 24, 1914. 164 S. W. Rep. 968.

4. INSURANCE—INDUSTRIAL POLICIES—CASH SURRENDER VALUE — INVESTIGATIONS BY INSURANCE COMMISSIONER—INJUNCTION.

Ky. Nonforfeiture Acts (Acts 1891-93, c. 171, § 122; Acts 1891-93, c. 243; Ky. St. 1894, § 659), as construed provide that policies of industrial insurance, the weekly premiums of which are not more than fifty cents, have a cash surrender value, but that demand must be made within eight weeks under the act of July 1st, and within five years under the act of April 5th. The Commissioner of Insurance, conceiving that many policyholders of industrial insurance had a right to a cash surrender on lapsed policies which might affect the solvency of the company, started an investigation and threatened to go through the insurance company's books and make public a list of those policyholders having such right. Before the investigation fairly started, the cost had been \$2,000, which the company was compelled to pay. Held that, on broad, equitable grounds, the court would enjoin the investigation as being beyond the powers of the commissioner, and as unnecessary to show its financial condition, where its surplus was \$30,000,000, and the policies affected as construed by the court amounted to a small matter.

(For other cases, see *Insurance*, Cent. Dig. § 10; Dec. Dig. § 10.)

Appeal from Circuit Court, Franklin County.

Suit for injunction by the Metropolitan Life Insurance Company against M. C. Clay, Commissioner of Insurance. From a decree dismissing the petition after overruling a demurrer to the complaint, complainant appeals. Reversed, and cause remanded.

Alex P. Humphrey and Wm. Marshall Bullitt, both of Louisville, for Appellant.

Jas. Garnett, Atty.-Gen., and M. M. Logan, Asst. Atty.-Gen., for Appellee.



**CORNELL vs. MUTUAL LIFE INS. CO. OF NEW YORK.*
(Springfield Court of Appeals. Missouri.)**

1. APPEAL AND ERROR—NEW TRIAL—DISCRETION OF TRIAL COURT—WEIGHT OF EVIDENCE.

The granting of a new trial, on the ground that the verdict is against the weight of the evidence, rests largely in the trial court's discretion, which should be interfered with only when abused.

(For other cases, see *Appeal and Error*, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. § 979; *New Trial*, Cent. Dig. §§ 146-148; Dec. Dig. § 72.)

2. NEW TRIAL—GROUNDS—INSUFFICIENCY.

To sustain the verdict on a motion for a new trial on the ground that the verdict is against the weight of the evidence, the evidence must not be contrary to the physical facts or so improbable as to be incredible, and must be substantial and have some probative force when taken in con-

* Decision rendered, April 7, 1914. 165 S. W. Rep. 858.

nction with all of the circumstances, but all reasonable inferences from facts proven must be considered as evidence.

(For other cases, see New Trial, Cent. Dig. §§ 146-148; Dec. Dig. § 72.)

3. NEW TRIAL—GROUNDS—INSUFFICIENCY OF EVIDENCE.

The fact that in weighing the evidence on motion for new trial the court concludes that the evidence supporting the verdict is so light as to amount to no evidence at all, were there no contradictory evidence, would not prevent it from also finding that, in any event, the opposing evidence outweighs it so as to authorize setting aside the verdict on the ground, that it is not supported by the weight of the evidence.

(For other cases, see New Trial, Cent. Dig. §§ 146-148; Dec. Dig. § 72.)

4. NEW TRIAL—GROUNDS—INSUFFICIENCY OF EVIDENCE.

Where, in an action on a life policy claimed by defendant to have been assigned by insured, the instructions required the jury to find, in order to find for defendant, that assured assigned the policy before his cash surrender right matured, and that after such right matured he authorized the assignee to so surrender it, the trial court could grant a new trial on the ground that the verdict for plaintiff was against the weight of the evidence, upon finding that the weight of the evidence was strongly against plaintiff as to one of the facts submitted, though it also found that there was no evidence at all for plaintiff on the other issue submitted; the grounds not being inconsistent.

(For other cases, see New Trial, Cent. Dig. §§ 146-148; Dec. Dig. § 72.)

5. INSURANCE—LIFE INSURANCE—ASSIGNMENT.

While, in the absence of a provision to the contrary in a life policy, the beneficiary has a vested right therein which cannot be impaired by assignments by insured, without the beneficiary's consent, the policy may be assigned without the beneficiary's consent if it provides for assignment or change of beneficiary.

(For other cases, see Insurance, Cent. Dig. § 473; Dec. Dig. § 205.)

6. INSURANCE—LIFE INSURANCE—ASSIGNMENT OF POLICY.

After a life policy was assigned or pledged pursuant to a provision therein, authorizing its assignment, the assignee or pledgee could, without subsequent ratification or authorization, foreclose the pledge and enforce the assignment.

(For other cases, see Insurance, Cent. Dig. §§ 488, 489, 494-496; Dec. Dig. § 219.)

7. INSURANCE—RIGHTS ASSIGNABLE—CONTINGENT INTERESTS.

A contingent interest, such as an assured's right to the cash surrender value of a life insurance policy after twenty years from its execution, could be assigned before such twenty years had expired.

(For other cases, see Insurance, Cent. Dig. §§ 166, 471; Dec. Dig. § 203.)

8. INSURANCE—LIFE INSURANCE—ASSIGNMENT OF POLICY.

An assignment of assured's right to the cash surrender value of a life policy after the expiration of twenty years from its execution need not be in writing, but could be made by the mere deposit of the policy as collateral security, and its retention by the pledgee, with the pledgor's consent, as security for an existing debt, until the right assigned had matured, when the pledgee could surrender the policy and apply the proceeds to his debt.

(For other cases, see Insurance, Cent. Dig. § 478; Dec. Dig. § 208.)

9. INSURANCE — LIFE INSURANCE — ACTION — SUFFICIENCY OF EVIDENCE—ASSIGNMENT OF POLICY.

In an action on a life policy, which the company claimed was assigned by assured, evidence *held* not to sustain a finding that assured did not sign a written assignment of his interest in the cash surrender value of the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

10. INSURANCE—LIFE INSURANCE—ASSIGNMENT.

Where, in an action on a life policy, it appeared that assured had, pursuant to a provision therein, assigned his interest in the cash surrender value of the policy, and that the policy was surrendered when it matured and its full cash value paid to the assignee, it is immaterial, with respect to the rights of the company and the original beneficiary, whether the rights under the assignment were legal or equitable; the transaction having been completed.

(For other cases, see Insurance, Cent. Dig. §§ 166, 471; Dec. Dig. § 203.)

Appeal from Circuit Court, Jasper County; Joseph D. Perkins, Judge. Action by Addie Cornell against the Mutual Life Insurance Company of New York. From an order setting aside a verdict for plaintiff and granting a new trial, plaintiff appeals. Affirmed.

R. A. Mooneyham, of Carthage, for Appellant.
McReynolds & Halliburton, of Carthage, and New & Krauthoff and P. E. Reeder, all of Kansas City, for Respondent.

**MODERN WOODMEN OF AMERICA *vs.* WEEKLEY.*
(Supreme Court of Oklahoma.)****1. INSURANCE — BENEFIT CERTIFICATE — CONSTRUCTION —FORFEITURE.**

A condition in a fraternal benefit certificate that, "if the above-named member shall, at any time after the issuance of this certificate, enter upon any of the hazardous occupations named in sections 15, 16 or 18 of the by-laws of this society, as the same now exist or may be hereafter modified, amended or enacted, the entering upon said employment shall limit or extinguish the liability of this society upon this certificate in accordance with the by-laws of the society," is a reasonable and binding provision. And, where the by-laws enumerate, among the hazardous occupations, "linemen in the employment of electric car company, or power or electric light company," and further provide that the effect of entering upon such hazardous occupations "shall totally exempt said society from any and all liability to such member, his beneficiary or beneficiaries, on account of the death of such member directly traceable to employment in such hazardous occupation," *held*, the certificate is not rendered void by the member entering upon such hazardous occupation, but the society is exempt from liability on account of death of the member by accident or

* Decision rendered, Feb. 10, 1914. 139 Pac. Rep. 1138. Syllabus by the Court.

disease directly traceable to such hazardous employment; the certificate remaining in full force and effect, and the association's liability continuing if death results from any other cause.

(For other cases, see Insurance, Cent. Dig. §§ 1893, 1894; Dec. Dig. § 748.)

2. INSURANCE—LIABILITY ON BENEFIT CERTIFICATE—ESTOPPEL—ACCEPTANCE OF DUES AND ASSESSMENTS.

Where, after the issuance of the certificate, the member enters upon such hazardous occupation, and death results directly traceable to such hazardous occupation, the society is not estopped from denying liability on such certificate by reason of the fact that the member's dues and assessments for a permissible occupation were accepted and retained up until the time of his death.

(For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.)

3. INSURANCE — MUTUAL BENEFIT INSURANCE — ACTION ON CERTIFICATE—PLEA—ESTOPPEL.

An estoppel or waiver of the conditions in a benefit certificate in order to be available to the beneficiary in an action thereon must be specifically and distinctly plead, and if not so plead evidence of such estoppel or waiver is not admissible at the trial.

(For other cases, see Insurance, Cent. Dig. §§ 1996-1998; Dec. Dig. § 815.)

4. INSURANCE—AUTHORITY OF AGENT—WAIVER OF CONDITIONS.

The local agent of an insurance company who has authority to solicit, execute, and deliver policies for the company has authority to waive conditions of the contract of insurance, but a local agent with power only to solicit applications and forward them to the company, who issues and delivers the policies, has no such power.

(For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. § 755.)

Commissioners' Opinion, Division No. 2. Error from Superior Court, Garfield County; Dan Huett, Judge.

Action by Mary Weekley against the Modern Woodmen of America to recover the amount of benefit certificate issued to June Weekley, deceased. Judgment was for the plaintiff; the defendant brings error. Reversed.

Truman Plantz, of Rock Island, Ill., Geo L. Bowman, of Kingfisher, and Geo. G. Perrin, of Rock Island, Ill., for Plaintiff in Error.

Parker & Simons, of Enid, for Defendant in Error.



MOONEY ET AL. vs. SUPREME COUNCIL OF ROYAL ARCANUM.—SAME vs. MUNN ET AL.*
(Supreme Court of Pennsylvania.)

1. INSURANCE—MUTUAL BENEFIT INSURANCE—FAILURE TO PAY ASSESSMENTS—FORFEITURE OF POLICY.

Where the rules of a beneficial society provided that nonpayment of any regular assessment would cause a forfeiture of membership, the bene-

* Decision rendered, Jan. 5, 1914. 90 Atl. Rep. 132.

ficiaries of the death certificate of a member who had defaulted in the payment of assessments could not recover thereon, though the assessments would have been paid by a beneficiary but for the belief that the insured died long prior to the time of his actual death.

(For other cases, see Insurance, Cent. Dig. § 1906; Dec. Dig. § 754.)

2. INSURANCE—MUTUAL BENEFIT INSURANCE—RECOVERY—CONTRACT LIMITATIONS.

Where the rules of a beneficial society provided that no action could be brought on a benefit certificate unless within three years from accrual of the cause of action, and where the insurance was paid to the beneficiary seven years after the disappearance of the insured, upon her giving bond to return same in case insured were alive, and where insured was found alive, and judgment entered on such bond, an action brought by the heirs of the beneficiary more than four years after the death of the insured to revive the death certificate was barred.

(For other cases, see Insurance, Cent. Dig. § 1993; Dec. Dig. § 812.)

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity by James Mooney and others against the Supreme Council of Royal Arcanum, a corporation, and bill by James Mooney and others against James J. Munn, Grand Master Workman, and James R. Kibler, Grand Recorder, representing themselves and all other members of the Grand Lodge of the Jurisdiction of Pennsylvania, Ancient Order of United Workmen, for the reinstatement and revival of death benefit certificates. From decrees dismissing the bills, plaintiffs appeal. Affirmed.

Argued before Fell, C. J., and Brown, Elkin, Stewart, and Moschzisker JJ.

Ward Bonsall and Charles A. Poth, both of Pittsburgh, for Appellants.
J. A. Langfitt and H. W. McIntosh, both of Pittsburgh, for Appellee
Supreme Council of Royal Arcanum.

R. A. Balph, of Pittsburgh, for Appellees Munn and others.

PER CURIAM.

These cases involve the same questions, and were argued together. The decree in each is affirmed on the findings of fact and conclusions of law by Judge Shafer in No. 185.



JENKNER vs. SUPREME TENT, KNIGHTS OF MACCABEES OF THE WORLD ET AL.* (Supreme Court of Pennsylvania.)

1. INSURANCE—ACTION ON POLICY—BURDEN OF PROOF.

Where, in an action on a policy providing that it shall be void if the insured commits suicide, the proofs of death furnished by the beneficiary give suicide as the cause of death, the burden is shifted to plaintiff to show that the death was not caused by suicide.

(For other cases, see Insurance, Cent. Dig. §§ 1999-2002; Dec. Dig. § 817.)

* Decision rendered, Jan. 5, 1914. 90 Atl. Rep. 73.

2. INSURANCE—ACTION ON POLICY—DIRECTION OF VERDICT—EVIDENCE.

Where, in an action on a life insurance policy providing that it should be void if insured committed suicide, the evidence presented a question of fact as to whether he drank carbolic acid with suicidal intent or by mistake, and there was evidence that the beneficiary, without knowledge of the contents, signed the proofs of death prepared by the insurer's representative which stated that insured committed suicide, the court properly refused to direct a verdict for defendant.

(For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.)

Appeal from Court of Common Pleas, Allegheny County.

Action by Fanny Jenkner against the Supreme Tent of the Knights of the Maccabees of the World, and Bessemer Tent No. 92, Knights of Maccabees of the World. From judgment for plaintiff, defendants appeal. Affirmed.

Argued before Fell, C. J., and Brown, Elkin, Stewart, and Moschzisker, JJ.

A. C. Johnston, of Pittsburgh, and S. F. Bowser, of Butler, for Appellants.

Jos. F. Mayhugh, of Pittsburgh, for Appellee.



LEDFORD *vs.* METROPOLITAN LIFE INS. CO.*

(Supreme Court of South Carolina.)

1. INSURANCE — LIFE POLICY — HEALTH WARRANTY — EVIDENCE.

In an action on a life policy, evidence of decedent's attending physician that within a year prior to the date of the policy he had treated her for a run-down condition of her system, and suspected lung trouble, but never made any tuberculin test, and did not know whether she had tuberculosis or not, was insufficient to sustain a defense under a provision of the policy that no obligation was incurred unless on the date of the policy insured was in sound health, in that at that time she was afflicted with tuberculosis.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

2. INSURANCE—LIFE POLICY—DEFENSES.

Where, in an action on a life policy, defendant pleaded unsound health of insured at the time the policy was issued by reason of tuberculosis, and for that reason the policy was void under a provision that no obligation was assumed thereunder unless insured was in good health at the time the policy was delivered, defendant was confined to the disability pleaded, and could not claim a forfeiture for other reasons,

(For other cases, see Insurance, Cent. Dig. §§ 1554, 1632-1644; Dec. Dig. § 645.)

* Decision rendered, April 21, 1914. 81 S. E. Rep. 497.

Appeal from Common Pleas Circuit Court of Greenwood County; Geo. E. Prince, Judge.

Action by Thomas V. Ledford against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. E. Elliott, Jr., of Columbia, and Featherstone & McGhee, of Greenwood, for Appellant.

Grier, Park and Nicholson, of Greenwood, for Respondent.



NOBLE *vs.* KANSAS CITY LIFE INS. CO.*

(Supreme Court of South Dakota.)

1. INSURANCE—PREMIUMS—EVIDENCE OF PAYMENT—STATUTORY PROVISION.

A provision of an insurance policy that it was issued in consideration of the annual premium of \$50.17 for one year's term insurance, and that "this policy will be continued upon the further payment of a like amount," etc., was an acknowledgment of the receipt of the first premium within Civ. Code, § 1849, declaring that an acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment so far as to make the policy binding, notwithstanding any stipulation that it shall not be binding until the premium is actually paid, since the word "continued," following the recital of the consideration, necessarily implies the existence of a policy, and the words "further payment" clearly imply, if they do not expressly acknowledge, a preceding payment.

(For other cases, see Insurance, Cent. Dig. §§ 231-245; Dec. Dig. § 137.)

2. INSURANCE—WAIVER OF PAYMENT OF PREMIUM—DELIVERY OF POLICY WITHOUT OBJECTION.

An insurance company, by delivering a policy and accepting a note for the first premium, thereby waived a provision declaring that the policy should not take effect unless the first premium had been paid.

(For other cases, see Insurance, Cent. Dig. §§ 75, 253-262; Dec. Dig. § 141.)

3. INSURANCE—ACTIONS ON POLICY—ADMISSIBILITY OF EVIDENCE.

Under Civ. Code, § 1849, declaring that an acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment so far as to make the policy binding, the insurance company could not show, in an action upon a policy containing such acknowledgment, that the payment was by note, and that the policy had lapsed by its nonpayment under another provision.

(For other cases, see Insurance, Cent. Dig. §§ 1674, 1686; Dec. Dig. § 654½.)

Appeal from Circuit Court, Davison County; Frank B. Smith, Judge.

Action by D. J. Noble, administrator, against the Kansas City Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

* Decision rendered, April 6, 1914. 146 N. W. Rep. 606.

Edward E. Wagner, of Sioux Falls, for Appellant.
 W. M. Herbert and Spangler & Haney, all of Mitchell, for Respondent.



MUTUAL LIFE INS. ASS'N OF DONLEY COUNTY vs. RHODERICK.*

(Court of Civil Appeals of Texas. Amarillo.)

1. APPEAL AND ERROR—REVIEW—ASSIGNMENTS OF ERROR.

Acts 33d Leg. c. 59, amending Rev. St. 1911, art. 1971, requires the charge to be in writing and signed by the judge, and provides that, after the evidence has been concluded, the charge shall be submitted to the parties for exception, and a reasonable time given to examine and present objections to it, which objections shall, "in every instance," be presented to the court before the charge is read to the jury, and all objections not so presented shall be waived. *Held*, that recitals in the record showing that appellant in open court, "prior to the reading of the main charge herein, excepts thereto as follows," stating the objections to the charge, and "each and all of the above exceptions to said charge being overruled, defendant in open court excepts," followed by a recital, "Refused," signed by the judge, were insufficient to authorize a review of alleged errors in the main charge.

(For other cases, see Appeal and Error, Cent. Dig. §§ 2928-2930; Dec. Dig. § 699.)

2. APPEAL AND ERROR—EXCEPTIONS—REFUSAL OF INSTRUCTIONS—PRESUMPTIONS.

Acts 33d Leg. c. 59, amending Rev. St. 1911, art. 1974, provides that, when instructions requested are refused, the judge shall note distinctly which are given and which are refused, and such instructions shall be filed with the clerk, and be a part of the record, and article 2061 provides that a ruling in refusing instructions shall be regarded as approved, unless excepted to as provided herein. *Held*, that in absence of exceptions in the record to the refusal of instructions the court's action thereon is deemed approved.

(For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.)

3. INSURANCE—MUTUAL BENEFIT INSURANCE—REINSTATEMENT.

Where a mutual benefit certificate or the by-laws of the association do not require the insured to be in good health as a condition to reinstatement upon the payment of arrears, it is not necessary that he be in good health in order to be so reinstated.

(For other cases, see Insurance, Cent. Dig. § 1924; Dec. Dig. § 761.)

4. APPEAL AND ERROR—FINDINGS—CONCLUSIVENESS.

The Court of Civil Appeals is bound by the jury's finding on a disputed question of fact.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.)

* Decision rendered, March 14, 1914. 164 S. W. Rep. 1067.

Appeal from District Court, Donley County; Cecil Storey, Special Judge.

Action by Mrs. S. F. Rhoderick against the Mutual Life Insurance Association of Donley County and others. From a judgment for plaintiff, the defendant named appeals. Affirmed.

H. B. White and E. A. Simpson, both of Clarendon, for Appellant.
E. T. Miller, J. Marvin Jones, and L. C. Barrett, all of Amarillo, for Appellee.



SOVEREIGN CAMP WOODMEN OF THE WORLD *vs.* WAGNON.*

(Court of Civil Appeals of Texas. Austin.)

1. TRIAL—SPECIAL INTERROGATORIES—CONSTRUCTION.

Where the court submitted a special issue whether the insured had failed to pay his lodge dues and assessments due on certain dates, the only fact to be found was whether the payments were made; the question whether they were due being one of law for the court in construing the by-laws of the order introduced in evidence.

(For other cases, see Trial, Cent. Dig. §§ 871-874; Dec. Dig. § 365.)

2. TRIAL — SPECIAL INTERROGATORIES — INCONSISTENT FINDINGS.

An answer to such issue, reading, "No, no April dues on May 1st, 1912," is to be construed as meaning that no dues were due on that date, not that the insured did not fail to pay them, where the answer to another issue found that the payments were not made by the insured or by any one for him.

(For other cases, see Trial, Cent. Dig. §§ 871-874; Dec. Dig. § 365.)

3. INSURANCE — MUTUAL BENEFIT INSURANCE — ACTIONS FOR BENEFITS—SPECIAL INTERROGATORIES—INCONSISTENT FINDINGS.

Even if there was a conflict between these two findings, that conflict must be reconciled by reference to the record, and, where the undisputed evidence shows that payments were not made and another finding was in harmony therewith, the jury must have intended to find that the insured failed to pay his assessments.

(For other cases, see Insurance, Cent. Dig. § 2011; Dec. Dig. § 827.)

4. JUDGMENT—MUTUAL BENEFIT INSURANCE—ACTIONS FOR BENEFITS—SPECIAL INTERROGATORIES — CONFORMITY OF JUDGMENT TO FINDINGS.

The fact that the jury also found that the assessments were not due and the suspension of the member improper does not authorize a judgment on the findings for the beneficiary, since that question was one for the court and not for the jury.

(For other cases, see Judgment, Cent. Dig. §§ 446-454; Dec. Dig. § 256.)

* Decision rendered, Jan. 21, 1914. Rehearing denied, March 25, 1914.
164 S. W. Rep. 1082.

**5. INSURANCE—MUTUAL BENEFIT INSURANCE—SUSPENSION
—WAIVER—LOCAL OFFICER.**

Under Rev. St. 1911, § 4847, providing that no subordinate body of a fraternal beneficiary association could waive the provisions of the laws or constitution of the body, an agreement by the clerk of a local camp to pay the assessments of a member when due, which agreement was beyond his authority, under the by-laws, is no defense to a suspension for nonpayment of dues, especially where there is no evidence that the sovereign camp had any notice of the agreement.

(For other cases, see Insurance, Cent. Dig. § 1906; Dec. Dig. § 754.)

**6. INSURANCE—MUTUAL BENEFIT INSURANCE—REINSTATE-
MENT—CERTIFICATE OF HEALTH—NECESSITY.**

Where the by-laws of a mutual benefit association required the payment of dues for reinstatement after suspension to be accompanied by a certificate that the insured was in good health, a tender not accompanied by such certificate does not entitle a member to reinstatement.

(For other cases, see Insurance, Cent. Dig. § 1924; Dec. Dig. § 761.)

**7. INSURANCE—MUTUAL BENEFIT INSURANCE—NONPAY-
MENT OF DUES—EXCUSE—INSANITY.**

Where the by-laws of a mutual benefit association required it to pay the dues of a member who was insane and financially unable to pay his dues, but provided that such payments should not be made if the member was in arrears more than three months, the association was not required to pay the dues where no proof of the insanity of a member was offered until six months after his suspension for nonpayment and more than three months after his death.

(For other cases, see Insurance, Cent. Dig. § 1906; Dec. Dig. § 754.)

Appeal from Coleman County Court; F. M. Bowen, Judge.

Action by Nora Wagoner against Sovereign Camp Woodmen of the World. Judgment for plaintiff, and defendant appeals. Reversed, and judgment rendered for defendant.

Woodward & Baker, of Coleman, and Flippen, Gresham & Freeman, of Dallas, for Appellant.

Snodgrass, Dibrell & Snodgrass, of Coleman, for Appellee.



**LADIES OF MACCABEES OF THE WORLD vs. KEN-
DRICK.***

(Court of Civil Appeals of Texas. Texarkana.)

**1. INSURANCE—MUTUAL BENEFIT INSURANCE—MISREP-
RESENTATIONS—TRUTH OF ANSWERS.**

In a statement made by decedent in applying for a mutual benefit certificate, she was asked whether she was then in good health, and whether she had ever changed or been ordered to change her residence on account of health, after which she was asked, "Have you consulted or

* Decision rendered, March 11, 1914. Rehearing denied, March 19, 1914.
165 S. W. Rep. 110.

been attended by any physician during the past five years?" which she answered, "No," following which were questions as to what was the cause for each consultation or attendance, and whether decedent had fully recovered from each illness. *Held*, that the fact that decedent was attended by a physician at a natural childbirth within five years did not make her answer to the quoted question false; that not being an illness or ailment within the meaning of the question.

(For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.)

2. INSURANCE — MUTUAL BENEFIT INSURANCE — STATEMENTS—FALSITY.

A negative answer to a question asked insured, "Have you ever had a surgical operation performed or received treatment in a hospital, sanitarium, retreat, or any public or private institution for the treatment of physical or mental disease?" was not made false by proof that insured had been operated on by a physician by surgical instruments at her home.

(For other cases, see Insurance, Cent. Dig. §§ 1859-1865; Dec. Dig. § 723.)

3. INSURANCE — MUTUAL BENEFIT INSURANCE — STATEMENTS—FALSITY.

A comma will not be supplied by construction after the word "performed" in order to make false a negative answer to a question asked insured, "Have you ever had a surgical operation performed or received treatment in a hospital * * * or any public or private institution for the treatment of physical or mental disease?" where the proof showed that insured had been operated on at her home.

(For other cases, see Insurance, Cent. Dig. §§ 1870-1872; Dec. Dig. § 726.)

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Action by William D. Kendrick against the Ladies of the Maccabees of the World. From a judgment for plaintiff, defendant appeals. Affirmed.

Odell & Turner and Homer L. Baughman, all of Ft. Worth, for Appellant.

Marsh & McIlwaine, of Tyler, for Appellee.



PROVIDENT SAVINGS LIFE ASSUR. SOCIETY OF NEW YORK ET AL. vs. ELLINGER.* (Court of Civil Appeals of Texas. Austin.)

1. INSURANCE — CONSOLIDATION — RIGHTS OF POLICY-HOLDERS—LIABILITY OF NEW COMPANY.

Where, on defendant's insurance business being taken over by the P. Company, the latter offered to assume plaintiff's policy, but he refused to consent to the novation, the P. Company was under no contractual relations with plaintiff, and hence he could not recover against it for defendant's alleged breach of contract resulting from the consolidation.

(For other cases, see Insurance, Cent. Dig. § 49; Dec. Dig. § 47.)

* Decision rendered, June 25, 1913. Writ of Error denied by Supreme Court, March 4, 1914. 164 S. W. Rep. 1024.

2. INSURANCE—CONSOLIDATION—BREACH OF CONTRACT—LIABILITY OF NEW COMPANY.

Where the consolidation of defendant insurance company with the P. Company did not deprive defendant of ability to perform its contracts or render it insolvent, but on the date when plaintiff chose to treat his policy as having been repudiated by defendant, by reason of the consolidation, defendant was amply able to fulfil the same, the P. Company was not liable in damages to plaintiff on the ground that it had absorbed all defendant's assets.

(For other cases, see Insurance, Cent. Dig. § 49; Dec. Dig. § 47.)

3. CONTRACTS—BREACH—MODE.

A contract can be breached in only one of three ways, viz: By failure to perform, by present positive declaration of an intention not to perform and acceptance of such declaration by the other party as a repudiation of the contract before performance is again entered upon, and by inability to perform.

(For other cases, see Contracts, Cent. Dig. § 1279½; Dec. Dig. § 312.)

4. INSURANCE—CONTRACT—BREACH.

Where an insurance policy obligated the insurer to pay \$3,000 to insured's wife at his death, there could be no breach by the insurer by failure to perform prior to the insured's death.

(For other cases, see Insurance, Cent. Dig. §§ 534-536; Dec. Dig. § 247.)

5. CONTRACTS — ANTICIPATORY BREACH — REFUSAL TO PERFORM—DECLARATION.

Where an anticipatory breach of contract is attempted to be shown by the declaration of the party that he will not perform the same, such declaration must be in positive and unconditional terms.

(For other cases, see Contracts, Cent. Dig. § 1279; Dec. Dig. § 313.)

6. INSURANCE — CONTRACT — BREACH — REFUSAL TO PERFORM.

Defendant insurance company, on consolidating with the P. Company, notified its policyholders of the fact, and the P. Company requested they accept it in lieu of defendant, but the letters did not contain any positive declaration that defendant would not continue to perform its contracts with holders refusing to accept the P. Company in lieu of it, nor did defendant surrender its corporate existence or go out of business as to contracts theretofore written. Policyholders were informed that branch offices of defendant would gradually be discontinued and premiums should be forwarded direct to defendant's New York office, but until further advised they might be remitted as at present. *Held*, that such facts did not show that defendant had breached its insurance contract with plaintiff by refusing to perform the same as to entitle plaintiff to recover damages therefor.

(For other cases, see Insurance, Cent. Dig. §§ 513-515; Dec. Dig. § 237.)

7. INSURANCE—CONTRACTS—BREACH—CONSOLIDATION.

Where, notwithstanding consolidation of defendant insurance company with the P. Company, defendant's affairs had never been liquidated, and in addition to its capital stock of \$100,000 it had on deposit with the New York Superintendent of Insurance \$100,000 in bonds, loans, and mortgages valued at \$101,710, and its report filed with the Commissioner of Insurance December 31, 1912, showed a surplus of \$255,409 over all liabilities, including capital stock, it did not appear

that by such consolidation it had breached its policy with plaintiff by pauperizing itself so that it was unable to perform the same.

(For other cases, see *Insurance*, Cent. Dig. §§ 513-515; Dec. Dig. § 237.)

8. INSURANCE—POLICY—BREACH OF CONTRACT—MEASURE OF DAMAGES.

In an action for an insurance company's breach of an ordinary life policy, plaintiff's measure of damages was the value of the policy at the time of its breach, consisting of the difference between what it would have cost him to mature the policy from the time of such breach to end of his expectancy, had there been no breach, and what it would have cost him to mature a like policy in a solvent company for the same period, and not the amount of premiums paid, with interest.

(For other cases, see *Insurance*, Cent. Dig. §§ 513-515; Dec. Dig. § 237.)

Appeal from District Court, Fayette County; Frank S. Roberts, Judge.

Action by Joseph Ellinger against the Provident Savings Life Assurance Society of New York and others. Judgment for plaintiff, and defendants appeal. Reversed and rendered.

Baker, Botts, Parker & Garwood and J. C. Townes, Jr., all of Houston, for Appellants.

John T. Duncan, of La Grange, for Appellee.

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REIFF vs. ARMOUR & CO.* (Supreme Court of Washington.)

EXEMPTIONS—INSURANCE PROCEEDS.

Rem. & Bal. Code, § 569, providing that the proceeds of all life or accident policies shall be exempt from all liability for debts, was enacted to exempt the proceeds from the debts of the insured. *Held*, that in view of the purpose of the statute, the exemption extends only to the debts of the insured, and a beneficiary who contracts debts cannot escape liability under the statute.

(For other cases, see *Exemption*, Cent. Dig. § 75; Dec. Dig. § 50.)

Department 1. Appeal from Superior Court, Spokane County; John B. Yakey, Judge.

Action by Marie Reiff against Armour & Co., a corporation. From a judgment for plaintiff, defendant appeals. Reversed and remanded with instructions to dismiss.

Tolman & King, of Spokane, for Appellant.
Merritt, Oswald & Merritt, of Spokane, for Respondent.

* Decision rendered, Mar. 28, 1914. 139 Pac. Rep. 633.

FIRE, TORNADO, ETC.

**CIRCUIT COURT OF THE UNITED STATES.
FOR THE DISTRICT OF KANSAS.**

GERMAN ALLIANCE INSURANCE COMPANY

vs.

**LEWIS, SUPERINTENDENT OF INSURANCE OF THE
STATE OF KANSAS. (No. 120.)***

The business of insurance is so far affected with a public interest as to justify legislative regulation of its rates.

A public interest can exist in a business, such as insurance, distinct from a public use of property, and can be the basis of the power of the Legislature to regulate the personal contracts involved in such business.

Where a business, such as insurance, is affected by a public use, it is the business that is the fundamental thing; property is but the instrument of such business.

Munn vs. Illinois, 94 U. S. 113; Budd vs. New York, 143 U. S. 517; Brass vs. North Dakota, 153 U. S. 391, demonstrate that a business by circumstances and its nature may rise from private to public concern and consequently become subject to governmental regulation; and the business of insurance falls within this principle.

The fact that a contract for insurance is one for indemnity and is personal, does not preclude regulation.

A general conception of the law-making bodies of the country that a business requires governmental regulation is not accidental and cannot exist without cause.

What makes for the general welfare is matter of legislative judgment, and judicial review is limited to power and excludes policy.

The liberty of contract guaranteed by the Fourteenth Amendment is not more intimately involved in price regulation than in other proper forms of regulation of business and property affected by a public use, and so *held* as to the regulation of rates of fire insurance.

The inactivity of a governmental power, no matter how prolonged, does not militate against its legality when exercised. United States vs. Delaware & Hudson Co., 213 U. S. 366.

Whether rate regulation is necessary in regard to a particular business affected by a public use, such as insurance, is matter for legislative judgment. This court can only determine whether the Legislature has the power to enact it.

A discrimination is not invalid under the equal protection provision of the Fourteenth Amendment if not so arbitrary as to be beyond the wide discretion that a Legislature may exercise; and so *held* as to a classification exempting farmers' mutual insurance companies doing only a farm business from the operation of an act regulating rates of insurance.

A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they appear and even degrees of evil may de-

* Decision rendered, Apr. 20, 1914. Argued, Dec. 10, 1913. 233 U. S. 389.

termine its exercise. *Ozan Lumber Co. vs. Union National Bank,* 207 U. S. 251.

The Kansas statute of 1909, so far as it provides for regulating rates of fire insurance, is not unconstitutional under the Fourteenth Amendment as depriving insurance companies of their property without due process of law, as abridging the liberty of contract or as denying companies charging regular premiums the equal protection of the law by excepting farmers' mutual insurance companies from its operation.

Statement of the Case.

Bill in equity to restrain the enforcement of the provisions of an act of the state of Kansas entitled "An act relating to Fire Insurance, and to provide for the Regulation and Control of rates of Premium Thereon, and to Prevent Discriminations Therein." Chap. 152 of the Session Laws of 1909.

The grounds of the bill are that the act offends the Constitution of the state and of the United States.

A summary of the requirements of the act is as follows:—

Sec. 1. Every fire insurance company shall file with the Superintendent of Insurance general basis schedules showing the rates on all risks insurable by such company in the state and all the conditions which affect the rates or the value of the insurance to the assured.

Sec. 2. No change shall be made in the schedules except after ten days' notice to the Superintendent, which notice shall state the changes proposed and the time when they shall go into effect. The Superintendent may allow changes upon less notice.

Sec. 3. When the Superintendent shall determine any rate is excessive or unreasonably high or not adequate to the safety or soundness of the company, he is authorized to direct the company to publish and file a higher or a lower rate, which shall be commensurate with the character of the risk; but in every case the rate shall be reasonable.

Sec. 4. No company shall engage or participate in insurance on property located in the state until the schedules of rates be filed nor write insurance at a different rate than the rate named in the schedules, or refund or remit in any manner or by any device any portion of the rates; or extend to any insured or other person any privileges, inducements or concessions except as specified in the schedules.

Sec. 5. Any company making insurance where no rate has been filed shall, within thirty days after entering into such contract, file with the Superintendent a schedule of such property showing the rate and such information as he may require. The schedule shall conform to the general basis of schedules and shall constitute the permanent rate of the company.

Sec. 6. The schedules shall be open to the inspection of the public, and each local agent shall have and exhibit to the public copies thereof relative to all risks upon which he is authorized to write insurance.

Sec. 7. No company shall directly or indirectly, by any special rate or by any device, charge or receive from any person a different rate of compensation for insurance than it charges or receives from any other person for like insurance or risks of a like kind and hazard under similar circumstances and conditions in the state. Any company violating this provision shall be deemed guilty of unjust discrimination, which is declared unlawful.

Sec. 8. The Superintendent may, if he finds that any company, or any officer, agent or representative thereof, has violated any of the provisions of the act, revoke the license of such offending company, officer, or agent, but such revocation shall not affect liability for the violation of any other section of the act; and provided that any action, decision or determination of the Superintendent under the provisions of the act shall be subject to review by the courts of the state as provided in the act.

Sec. 9. The Superintendent shall give notice of any order or regulation made by him under the act, and any company, or any person, city or municipality which shall be interested, shall have the right within thirty days to bring an action against the Superintendent in any district court of the state to have the order or regulation vacated. Issues shall be formed and the controversy tried and determined as in other cases of a civil nature, and the court may set aside one or more or any part of any of the regulations or orders which the court shall find to be unreasonable, unjust, excessive or inadequate to compensate the company writing insurance thereon for the risk assumed by it, without disturbing others. The order of the Superintendent shall not be suspended or enjoined, but the court may permit the complaining company to write insurance at the rates which obtained prior to such order upon the condition that the difference in the rates shall be deposited with the Superintendent to be paid to the company or to the holders of policies as, on final determination of the suit, the court may deem just and reasonable. During the pendency of the suit no penalties or forfeitures shall attach or accrue on account of the failure of the complainant to comply with the order sought to be vacated or modified until the final determination of the suit. Proceedings in error may be instituted in the Supreme Court of the state as in other civil cases, and that court shall examine the record, including the evidence, and render such judgment as shall be just and equitable. No action shall be brought in the United States courts until the remedies provided by the act shall have been exhausted. If any company organized under the laws of the state or authorized to transact business in the state shall violate the section, the Superintendent may cancel the authority of the company to transact business in the state.

Sec. 10. Infractions of the act are declared to be misdemeanors and punishable by a fine not exceeding \$100 for each

offense, provided that if the conviction be for an unlawful discrimination the punishment may be by a fine or by imprisonment in the county jail not exceeding ninety days, or by both fine and imprisonment.

Sec. 11. No person shall be excused from testifying at the trial of any other person on the ground that the testimony may incriminate him, but he shall not be prosecuted on account of any transaction about which he may testify except for perjury committed in so testifying: "provided, that nothing in this act shall affect farmers' mutual insurance companies organized and doing business under the laws of this state and insuring only farm property."

The bill alleged that it was brought by the German Alliance Insurance Company in behalf of itself and all other companies and corporations conducting a similar business and similarly situated, and that Charles W. Barnes was the duly elected Superintendent of Fire Insurance of the state of Kansas. It alleged the jurisdictional amount, and that the controversy was one arising under the Constitution of the United States and of the state of Kansas. It alleged, further, the following facts, which we state in narrative form, omitting those which relate to the constitution of the state, no assignment of error being based upon them: The appellant, to which we shall refer as complainant, was incorporated under the laws of New York as a fire insurance company in 1879 and immediately entered upon such business, and it has for long periods of time conducted the business of fire insurance in Kansas and other states of the United States.

The business of fire insurance as conducted by it consists of making indemnity contracts against direct loss or damage by fire for a consideration paid, known as a premium; that the rate or premium is the amount charged for each \$100 of indemnity. The property which is the subject of insurance is ordinarily known and designated as the risk. Complainant issues indemnity contracts or fire insurance policies covering all kinds and descriptions of improvements upon real estate and the contents thereof and all kinds and descriptions of personal property and also farm houses, barns and granaries and their contents. The rate of premium varies with the kind of property covered, its physical characteristics and situation, its exposure, the presence or absence of fire protection, and many other causes.

The establishment of the basis rate for the premium to be charged is a matter of technical and mathematical deduction from the experience of all fire insurance companies covering a long period of years and, territorially, the whole civilized world. To make such deduction it is necessary not only to be in possession of the compiled statistics of fire insurance busi-

ness, but also to be skilled in the mathematical "theory of probabilities" and in the "law of large numbers" so as to be able to apply with technical accuracy such laws and such data, and that no one not specially trained as an insurance statistician is competent to make such deductions.

A theoretically correct basis rate having thus been arrived at is subject to variation according to the risk, whether in town or country, and if in the former, according to the class of town or city in which it is situated. The classification of towns and cities depends upon water supply, fire protection and general physical conditions. In addition to ascertaining the individual risk, if a building, the size, material of which and the manner in which it is constructed, the character of the occupancy, and the character of the occupancy and construction of adjacent buildings, also the character of the contents of the buildings and the manner in which they are stored and the precautions used to detect and prevent fires, are necessary to be ascertained.

Complainant and others engaged in the insurance business employ a large number of men skilled as inspectors to report upon individual risks, and it is impossible to fix and adjust a reasonable rate of premium for each and every individual risk without the information so obtained and having the same applied by experts. And such training and information are necessary to determine whether a basic rate or actual rate as applied to any particular risk is or is not reasonable, and the respondent is not possessed of the requisite information or special training necessary to qualify for such determination and any conclusion to which he might come would be a mere guess or arbitrary determination; and the provisions of the act can only be properly administered in any event by the employment by the state of a corps of inspectors and experts specially trained in the business of fixing rates of fire insurance.

The complainant has complied with all of the laws of the state and has received the regular license or authorization of the state, to transact the business of fire insurance therein.

It conducts its business by means of resident agents, of which it has seventy-two directly employed; it has a large and valuable established business to secure which it has expended a large sum of money, and to be compelled to give up its business would result in irreparable damage and injury to it. A large number of the fire insurance policies issued by complainant are written upon farm buildings and their contents and in writing such business it comes into direct competition with various farmers' mutual insurance companies organized and doing business under the laws of the state and insuring only farm property.

The business of fire insurance is purely and exclusively a private business and may be transacted by private persons in their individual capacity or by unincorporated or incorporated

companies, that the amount of indemnity and the premium is a matter of private negotiation and agreement, and the act of the Legislature of the state of Kansas attempts to regulate the business in so far as the fixing of the rate of premium is concerned and in the attempted regulation distinguishes between fire insurance companies and individuals and partnerships, and thereby denies to complainant and other companies the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States, and is therefore unconstitutional and void.

Under the laws of Kansas, mutual fire insurance companies may be organized, that such companies having a guaranteed fund of \$25,000 may do business on a cash basis and accept premiums in cash and that such premium measures the total liability of the insured under the policy either to the company or to its creditors; that by the eleventh section of the act under review, it is provided "that nothing in this act shall affect farmers' mutual insurance companies, organized and doing business under the laws of this state, and insuring only farm property." The complainant and many other companies insure farm property and come into direct competition with farmers' mutual companies of the character specified and the act of the Legislature in excepting the latter companies deprives complainant of the equal protection of the laws and is therefore repugnant to the Fourteenth Amendment of the Constitution of the United States and is unconstitutional and void.

The business of fire insurance is private, with which the state has no right to interfere, and the right to fix by private contract the rate of premium is a property right of value; the business is not a monopoly either legally or actually, it may not be legally conducted by the National Government or by the state of Kansas or other states under their respective constitutions, and is not a business included within the functions of government. Neither complainant nor others engaged in fire insurance receive or enjoy from the state of Kansas, or any government, state or national, any privilege or immunity not in like manner and to like extent received and enjoyed by all other persons, partnerships and companies, incorporated or unincorporated, respectively, engaged in the conduct of other lines of private business and enterprises. Complainant, therefore, is deprived of one of the incidents of liberty and of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

The act distinguishes between fire insurance companies and other insurance companies, individuals and persons, and distinguishes between insurance and other lines of business and thereby offends the equality clause of the Constitution of the United States.

Complainant, under protest, filed the general basis schedules of its rates as required by the act, which were arrived at by the process hereinbefore set out. On the nineteenth of August, 1909, respondent made a reduction of 12 per cent from the rates as filed and from the rates filed by other companies, with the proviso that it should not apply to residence property, churches, schoolhouses, farm property or special hazards. The order was to become effective September 1, 1909. And it was further ordered that on and after that date the exception of churches and dwelling houses should be eliminated. Complainant notified the superintendent by letter that it would, under protest, and reserving the rights which it had under the law, comply with the provision of the order.

The risks included in the order and not excepted therefrom, comprise all ordinary mercantile risks in the state and that the reduction of 12 per cent will result in a rate which is much less than the cost of carrying the risks.

Respondent is threatening to make further reductions and it is proposed to revoke the license of any fire insurance company which may violate the provisions of the act, even though the rates fixed by him may be so low as to be confiscatory and to inflict upon the officers of the company, including complainant, the penalties prescribed for such violation, and such companies and complainant, unless defendant be restrained by injunction, will be obliged to comply with the requirements of the act to their irreparable damage and injury.

Complainant finally alleges that it is not its purpose to attack the orders of respondent on the ground that they were not made in strict compliance with the provisions of the act, but to have the act in its entirety declared to be unconstitutional and void for the reasons alleged, and to have respondent restrained and orders made by him under the provisions of the act enjoined. And such an injunction is prayed.

Respondent filed a demurrer stating that he demurred to so much of the bill as charges the act of the state of Kansas to be repugnant to the constitution of Kansas and the Constitution of the United States. The demurrer was sustained. Subsequently, upon the bill being amended, a general demurrer was filed, which was also sustained by the court, and the bill dismissed. Prior, however, to this action, it having been suggested that the term of office of Charles W. Barnes as Superintendent of Insurance had expired and that Ike Lewis had succeeded to that office and to all of its duties and powers, he was made defendant in the place and stead of Charles W. Barnes.

Argument for Appellant.

Thomas Bates and John G. Johnson, (Seymour Edgerton, on the brief), for Appellant.

The business of fire insurance is a private business and the

public has no legal right to demand its service. *Am. Surety Co. vs. Shallenberger*, 183 Fed. Rep. 636; *Hunt vs. Simmons*, 19 Missouri, 583; *Orr vs. Home Ins. Co.*, 12 La. Ann. 255; *Queen Ins. Co. vs. State*, 86 Texas, 250.

The state has not the power to fix the rates charged to the public either by corporations or individuals engaged in a private business, and the test as to whether a use is public or not is whether a public trust is imposed upon the property, and whether the public has a legal right to the use which cannot be denied. *Allen vs. Jay*, 60 Maine, 124; *Am. L. S. C. Co. vs. Chi. Live Stock Exch.*, 143 Illinois, 210; *Arnsperger vs. Crawford*, 101 Maryland, 247; *Avery vs. Vermont El. Co.*, 75 Vermont, 235; *Brown vs. Gerald*, 100 Maine, 351; *Burlington vs. Beasley*, 94 U. S. 310; *Ches. & Pot. Tel. Co. vs. Manning*, 186 U. S. 238; *Citizens' Savings Assn. vs. Topeka*, 20 Wall. 655; *Collister vs. Hayman*, 183 N. Y. 250; *Dutton vs. Strong*, 1 Black, 1; *Ex parte Quarg*, 149 California, 79; *Fallsberg Co. vs. Alexander*, 101 Virginia, 98; *Farmers' Market Co. vs. P. & R. T. Ry. Co.*, 142 Pa. St. 580; *Gaylord vs. Sanitary Dist.*, 204 Illinois, 567; *Howard Mills vs. Schwartz Lumber Co.*, 77 Kansas, 599; *Horney vs. Nixon*, 213 Pa. St. 20; *Hurley vs. Eddingfield*, 156 Indiana, 416; *Jacobs vs. Water Sup. Co.*, 220 Pa. St. 388; *L. & N. R. Co. vs. West Coast Co.*, 198 U. S. 483; *Ladd vs. Southern Cotton Co.*, 53 Texas, 172; *Pearce vs. Spalding*, 12 Mo. App. 141; *People vs. Steel*, 231 Illinois, 340; *Purcell vs. Daly*, 19 Abb. N. C. 301; *Queen Ins. Co. vs. State*, 86 Texas, 250; *Ryan vs. Terminal Co.*, 102 Tennessee, 111; *Shasta Power Co. vs. Walker*, 149 Fed. Rep. 568; *Sholl vs. German C. Co.*, 118 Illinois, 427; *Stock Exchange vs. Board of Trade*, 127 Illinois, 153; *State vs. Associated Press*, 159 Missouri, 410; *Tyler vs. Beacher*, 44 Vermont, 648; *Ulmer vs. Ry. Co.*, 98 Maine, 579; *Weems Steamboat Co. vs. People's Steamboat Co.*, 214 U. S. 345.

The regulation of rates and charges in a private business is not within the police power of the State. *Adair vs. United States*, 208 U. S. 175; *Coffeyville Co. vs. Perry*, 69 Kansas, 297; *Connolly vs. Union Pipe Co.*, 184 U. S. 540; *Dobbins vs. Los Angeles*, 195 U. S. 223; *Ex parte Dicky*, 144 California, 234; *Holden vs. Hardy*, 169 U. S. 366; *Hurtado vs. California*, 110 U. S. 535; *In re Berger*, 195 Missouri, 16; *Kreibohm vs. Yansey*, 154 Missouri, 67; *Lawton vs. Steel*, 152 U. S. 133; *Lochner vs. New York*, 198 U. S. 45; *Mugler vs. Kansas*, 123 U. S. 623; *Muller vs. Oregon*, 208 U. S. 412; *Munn vs. Illinois*, 94 U. S. 113; *People vs. Steele*, 231 Illinois, 340; *People vs. Coler*, 166 N. Y. 1; *State vs. Associated Press*, 159 Missouri, 410; *Street vs. Varney El. Sup. Co.*, 160 Indiana, 338; *West Branch Ex. vs. McCormick*, 1 Pa. Dist. Rep. 542.

The Kansas rate law of 1909 cannot be sustained as a condition precedent to the right of a foreign corporation to do business in

the state. *Ætna Ins. Co. vs. Jones*, 78 So. Car. 445; *American Co. vs. Shallenberger*, 183 Fed. Rep. 636; *Cargill vs. Minnesota*, 180 U. S. 452; *Carroll vs. Greenwich Ins. Co.*, 199 U. S. 401; *Connolly vs. Union Pipe Co.*, 184 U. S. 540; *Ins. Co. vs. Prewitt*, 202 U. S. 246; *Lafayette Ins. Co. vs. French*, 18 How. 404; *Nat. Council vs. State Council*, 203 U. S. 151; *Orient Ins. Co. vs. Daggs*, 172 U. S. 557; *So. Pac. Co. vs. Denton*, 146 U. S. 202; *Waters-Pierce Oil Co. vs. Texas*, 177 U. S. 28; *West. Un. Tel Co. vs. Kansas*, 216 U. S. 1.

The law cannot be sustained on the ground that it is within the power of the Legislature of a state to impose such conditions as it likes upon corporations which derive their right to exist from the state. *Lake Shore &c. R. Co. vs. Smith*, 173 U. S. 684; *People vs. Budd*, 117 N. Y. 1; *State vs. Associated Press*, 159 Missouri, 410.

The business of fire insurance is not a monopoly. *Herriman vs. Menzies*, 115 California, 16; *United States vs. American Tobacco Co.*, 164 Fed. Rep. 700.

The business of fire insurance is not a proper function of government, nor does it receive special privileges from the state. *Ætna Life Ins. Co. vs. Coulter*, 115 Kentucky, 787; *Ohio vs. Guilbert*, 56 Oh. St. 575; *Opinion of the Justices*, 155 Massachusetts, 598; *Id. 182 Massachusetts*, 605; § 4091, Gen. Stat. Kansas, 1909.

A general public interest is not equivalent to a public use. *Lowell vs. Boston*, 111 Massachusetts, 454; *Matter of Mayor of New York*, 135 N. Y. 253; *Matter of Niagara Falls Co.*, 108 N. Y. 375.

The power to regulate rates and charges is simply the power to take private property for public use. *Charles River Bridge Case*, 11 Peters, 420; *Cole vs. La Grange*, 113 U. S. 1; *Dodge vs. Michigan Twp.*, 107 Fed. Rep. 827; 2 Kent's Comm. 333; *Lowell vs. Boston*, 111 Massachusetts, 454; *Opinion of the Justices*, 155 Massachusetts, 598. See also, as bearing on this subject: *Allnutt vs. Inglis*, 12 East, 527; *Brass vs. North Dakota*, 153 U. S. 391; *Budd vs. New York*, 143 U. S. 517, S. C., 117 N. Y. 1; *State vs. Edwards*, 86 Maine, 102; *Munn vs. Illinois*, 94 U. S. 113; *Spring Valley Co. vs. Schottler*, 110 U. S. 347; *Burlington vs. Beasley*, 94 U. S. 310; *Dow vs. Beidelman*, 125 U. S. 680; *Wabash &c. Ry. Co. vs. Illinois*, 118 U. S. 557; *German Alliance Ins. Co. vs. Hale*, 219 U. S. 307; *Noble State Bank vs. Haskell*, 219 U. S. 104 and 575; *Dodge vs. Mission Township*, 107 Fed. Rep. 827; *Paul vs. Virginia*, 8 Wall. 168.

Mr. John S. Dawson, Attorney-General of the state of Kansas, with whom Mr. S. N. Hawks, Mr. F. S. Jackson and Mr. C. B. Smith were on the brief for appellee.

The act complained of is within the police power of the state. *Noble State Bank vs. Haskell*, 219 U. S. 112 and 575; *German*

Alliance Ins. Co. vs. Hale, 219 U. S. 307; Carroll vs. Greenwich Ins. Co., 199 U. S. 401, 411; Jacobson vs. Massachusetts, 197 U. S. 11, 27, 31; Lake Shore &c. R. R. vs. Ohio, 173 U. S. 285, 297; Citizens' Ins. Co. vs. Clay, 197 Fed. Rep. 435; German Alliance Ins. Co. vs. Barnes, 189 Fed. Rep. 769.

The act is not repugnant to § 1 of the Fourteenth Amendment, as the state has full power of classification. Hays vs. Missouri, 120 U. S. 68; Railroad Co. vs. Mackey, 127 U. S. 205; Walston vs. Nevin, 128 U. S. 578; Bell's Gap R. R. vs. Pennsylvania, 134 U. S. 232; Pacific Exp. Co. vs. Seibert, 142 U. S. 339; Giozza vs. Tiernan, 148 U. S. 657; Columbia Southern Ry. vs. Wright, 151 U. S. 470; Marchant vs. Penna. R. R., 153 U. S. 380; St. Louis & S. F. Ry. vs. Mathews, 165 U. S. 1; Railroad Co. vs. Matthews, 174 U. S. 99; Barbier vs. Connolly, 113 U. S. 27; St. Louis &c. Ry. Co. vs. Paul, 173 U. S. 404.

The act is not repugnant to either the due process clause of the Fourteenth Amendment or to the equal protection clause. Magoun vs. Illinois Trust Co., 170 U. S. 283; Railway Co. vs. Mackey, 127 U. S. 204, 208; Minn. & St. L. Ry. vs. Beckwith, 129 U. S. 26; Davidson vs. New Orleans, 96 U. S. 97; Holden vs. Hardy, 169 U. S. 366, 389; Hooper vs. California, 155 U. S. 648; Paul vs. Virginia, 8 Wall. 168, 179; Ducat vs. Chicago, 10 Wall. 410, 415; Liverpool Ins. Co. vs. Massachusetts, 10 Wall. 566, 573; Orient Ins. Co. vs. Daggs, 172 U. S. 561; Blake vs. McClung, 172 U. S. 239; Santa Clara County vs. Southern Pac., 118 U. S. 394; Smyth vs. Ames, 169 U. S. 466; Crutcher vs. Kentucky, 141 U. S. 47; Bank of Augusta vs. Earle, 13 Pet. 519; Paul vs. Virginia, 8 Wall. 168; Cooper Mfg. Co. vs. Ferguson, 113 U. S. 727; Phila. Fire Assn. vs. New York, 119 U. S. 110; Fritts vs. Palmer, 132 U. S. 282; Mo. Pac. Ry. Co. vs. Mackey, 127 U. S. 209; Barbier vs. Connolly, 113 U. S. 32; Soon Hing vs. Crowley, 113 U. S. 703; Railway Tax Cases, 115 U. S. 322; Home Ins. Co. vs. New York, 134 U. S. 606; Pac. Exp. Co. vs. Seibert, 142 U. S. 339; New York &c. vs. Bristow, 151 U. S. 571.

The validity of the act can be sustained under the police power of the state, as well as under the power of the state to regulate corporations created by it, or permitted by it to do business within its borders. Assurance Co. vs. Bradford, 60 Kansas, 85; Railroad Co. vs. Matthews, 58 Kansas, 447; Gulf R. R. Co. vs. Ellis, 165 U. S. 155; Atkinson vs. Woodmansee, 68 Kansas, 74; Fidelity Life Assn. vs. Mettler, 185 U. S. 322; Railroad Co. vs. Matthews, 174 U. S. 96; Orient Ins. Co. vs. Daggs, 172 U. S. 557; Waters-Pierce Oil Co. vs. Texas, 177 U. S. 28; N. Y. Life Ins. Co. vs. Cravens, 178 U. S. 384; Insurance Co. vs. Warren, 181 U. S. 73; Commonwealth vs. Vrooman, 164 Pa. St. 306; Doyle vs. Insurance Co., 94 U. S.

535; State vs. Mo. Pac. Ry. Co., 33 Kansas, 176; Leavenworth vs. Water Co., 62 Kansas, 643; Inhabitants of Wayland vs. Middlesex County, 4 Gray (Mass.), 500; Irrigation Co. vs. Klein, 63 Kansas, 484; West vs. Bank, 66 Kansas, 524.

The classifications made by the Legislature are proper. 4 Supreme Court Encyc. 357; Heath & Milligan vs. Worst, 207 U. S. 354; Ozan Lumber Co. vs. Union Natl. Bank, 207 U. S. 256; Mobile Co. vs. Kimball, 102 U. S. 691; Gulf, C. & S. F. R. Co., vs. Ellis, 165 U. S. 150; Missouri, K. & T. R. Co. vs. May, 194 U. S. 267.

Insurance is affected by public interest. State vs. Insurance Co., 30 Kansas, 585; State vs. Phipps, 50 Kansas, 609; Blaker vs. Hood, 53 Kansas, 499, 509; State vs. Phipps, 50 Kansas, 619; Freund on Police Power, §§ 400-401; Ætna Life Ins. Co. vs. Hardison, 199 Massachusetts, 181; N. Y. Life Ins. Co. vs. Hardison, 199 Massachusetts, 190; 3 Selected Essays in Anglo-Am. Legal History, p. 108; Zartman's Yale Readings in Ins. pp. 9-10, and 213; Arnold on Marine Ins. 102; Munn vs. Illinois, 94 U. S. 113; 7 Encyc. U. S. Sup. Ct. Rep. 78; 4 Encyc. U. S. Sup. Ct. Rep. 77; Northwestern Ins. Co. vs. Riggs, 203 U. S. 243; Phœnix Ins. Co. vs. Montgomery, 42 L. R. A. 468; Exempt Firemen vs. Roone, 93 N. Y. 313; Firemen's Assn. vs. Louisburg, 21 Illinois, 511; Milwaukee vs. Helfenstein, 16 Wisconsin, 142.

As to the right to fix rates, see Winchester Turnpike Co. vs. Croxton, 33 L. R. A. 177; Munn vs. Illinois, 94 U. S. 113; Georgia R. R. Co. vs. Smith, 128 U. S. 174; Allnutt vs. Lord Hale (De Portibus Maris, 1 Hargrave's Law Tracts, 78); Mobile vs. Yuille, 3 Alabama, 137; Laurel Fork R. R. Co. vs. West Virginia Trans. Co., 25 W. Va. 324; Allnutt vs. Inglis, 12 East, 527; People vs. Budd, 117 N. Y. 1, S. C., 143 U. S. 517; Re Annon, 50 Hun, 415, aff'd 26 N. Y. S. R. 554; Spring Valley Co. vs. Schottle, 110 U. S. 347; Brass vs. Stoeser, 153 U. S. 391, aff'g, 2 Nor. Dak. 482.

As to public interest and public use, see Budd vs. New York, 143 U. S. 517; Freund's Police Power, §§ 304, 378; People vs. Formosa, 61 Hun, 272; Boxwell vs. Security Life Ins. Co., 193 N. Y. 465; Lumbermen's Exchange vs. Fisher, 150 Pa. St. 475; Craig vs. Kline, 65 Pa. St. 399; Henry vs. Roberts, 50 Fed. Rep. 902; Genesee Fork Co. vs. Ives, 144 Pa. St. 114; Mobile vs. Yuille, 3 Alabama, 137; Brass vs. Stoeser, 153 U. S. 391; McCarty vs. Firemen's Ins. Co., 73 Atl. Rep. 80; Civil Rights Cases, 109 U. S. 62.

As to illegality of fire underwriters' associations, see N. Y. Bd. of Underwriters vs. Higgins, 114 N. Y. Supp. 506; Firemen's Fund Ins. Co. vs. Helner, 49 So. Rep. 297; Continental Co. vs. Parks, 142 Alabama, 650, 39 So. Rep. 204; Orient Ins.

Co. vs. Daggs, 172 U. S. 565; Farmers' Ins. Co. vs. Dobney, 189 U. S. 301; Barbier vs. Connelly, 113 U. S. 27, 28.

McKENNA, J. (after stating the case as above, delivered the opinion of the court).

The specific error complained of is the refusal of the district court to hold that the act of the state of Kansas is unconstitutional and void as offending the due process clause of the Fourteenth Amendment of the Constitution of the United States. To support this charge of error, complainant asserts that the business of fire insurance is a private business and, therefore, there is no constitutional power in a state to fix the rates and charges for services rendered by it. An exercise of such right, it is contended, is a taking of private property for a public use. The contention is made in various ways and, excluding possible countervailing contentions, it is urged that the act under review cannot be justified as an exercise of the police power or of the power of the state to admit foreign corporations within its borders upon such terms as it may prescribe, or of any other power possessed by the state; that no state has the power to impose unconstitutional burdens either upon private citizens or private corporations engaged in a private business.

The basic contention is that the business of insurance is a natural right, receiving no privilege from the state, is voluntarily entered into, cannot be compelled nor can any of its exercises be compelled; that it concerns personal contracts of indemnity against certain contingencies merely. Whether such contracts shall be made at all, it is contended, is a matter of private negotiation and agreement, and necessarily there must be freedom in fixing their terms. And "where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist." Many elements, it is urged, determine the extending or rejection of insurance; the hazards are relative and depend upon many circumstances upon which there may be different judgments, and there are personal considerations as well—"moral hazards," as they are called.

It is not clear to what extent some of these circumstances are urged as affecting the power of regulation in the state. It would seem to be urged that each risk is individual and no rule of rates can be formed or applied. The bill asserts the contrary. It in effect admits that there can be standards and classification of risks, determined by the law of averages. Indeed, it is a matter of common knowledge that rates are fixed and accommodated to those standards and classification in pre-arranged schedules, and, granted the rates may be varied in particular instances, they are sufficiently definite and applicable as a general and practically constant rule. They are the product, it is true, of skill and experience, but such skill and experience a regulating body may

have as well as the creating body. Indeed, an allegation in the original bill that the Superintendent of Insurance could not have the requisite technical and mathematical training to determine whether a basic rate or an actual rate as applied to any particular risk was or was not reasonable and that his conclusion, therefore, "would be a mere guess or arbitrary determination" was omitted by an amendment. It would indeed be a strained contention that the government could not avail itself, in the exercise of power it might deem wise to exert, of the skill and knowledge possessed by the world. We may put aside, therefore, all merely adventitious considerations and come to the bare and essential one, whether a contract of fire insurance is private and as such has constitutional immunity from regulation. Or, to state it differently and to express an antithetical proposition, is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates? And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation. We can best explain by examples. The transportation of property—business of common carriers—is obviously of public concern and its regulation is an accepted governmental power. The transmission of intelligence is of cognate character. There are other utilities which are denominated public, such as the furnishing of water and light, including in the latter gas and electricity. We do not hesitate at their regulation nor of the fixing of the prices which may be charged for their service. The basis of the ready concession of the power of regulation is the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates. It is said, the state has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the "test of whether the use is public or not is whether a public trust is imposed upon the property and whether the public has a legal right to the use which cannot be denied;" or, as we have said, quoting counsel, "Where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist." Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test it applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use which, necessarily, it is contended, can only apply to property, not to personal con-

tracts. The distinction, we think, has no basis in principle (*Noble State Bank vs. Haskell*, 219 U. S. 104), nor has the other contention that the service which cannot be demanded cannot be regulated.

Munn vs. Illinois, 94 U. S. 113, is an instructive example of legislative power exerted in the public interest. The constitution of Illinois declared all elevators or storehouses, where grain or other property was stored for a compensation, to be public warehouses, and a law was subsequently enacted fixing rates of storage. In other words, that which had been private property had from its uses become, it was declared, of public concern and the compensation to be charged for its use prescribed. The law was sustained against the contention that it deprived the owners of the warehouses of their property without due process of law. We can only cite the case and state its principle, not review it at any length. The principle was expressed to be, quoting Lord Chief Justice Hale, "that when private property is 'affected with a public interest it ceases to be *juris privati*' only" and it becomes "clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large"; and, so using it, the owner "grants to the public an interest in that use, and must submit to be controlled by the public for the common good." And it was said that the application of the principle could not be denied because no precedent could be found for a statute precisely like the one reviewed. It presented a case, the court further said, "for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress." The principle was expressed as to property, and the instance of its application was to property, but it is manifestly broader than that instance. It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest.

That the case had broader application than the use of property is manifest from the grounds expressed in the dissenting opinion. The basis of the opinion was that the business regulated was private and had "no special privilege connected with it, nor did the law ever extend to it any greater protection than it extended to all other private business." The argument encountered opposing examples, among others, the regulation of the rate of interest on money. The regulation was accounted for on the ground that the act of Parliament permitting the charging of some interest was a relaxation of a prohibition of the common law against charging any interest, but this explanation overlooked the fact that both the common law and the act of Parliament were exercises of government regulation of a strictly private business in the interest of public policy, a policy which

still endures and still dictates regulating laws. Against that conservatism of the mind, which puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it has become familiar, government—state and National—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guaranties impaired.

Munn vs. Illinois was approved in many state decisions, but it was brought to the review of this court in Budd vs. New York, 143 U. S. 517, and its doctrine, after elaborate consideration, reaffirmed, and against the same arguments which are now urged against the Kansas statute. Nowhere have these arguments been, or could be advanced with greater strength and felicity of expression than in the dissenting opinion of Mr. Justice Brewer. Every consideration was adduced, based on the private character of the business regulated and, for that reason, its constitutional immunity from regulation, with all the power of argument and illustration of which that great judge was a master. The considerations urged did not prevail. Against them the court opposed the ever-existing police power in government and its necessary exercise for the public good and declared its entire accommodation to the limitations of the Constitution. The court was not deterred by the charge (repeated in the case at bar) that its decision had the sweeping and dangerous comprehension of subjecting to legislative regulation all of the businesses and affairs of life and the prices of all commodities. Whether we may apprehend such result by extending the principle of the cases to fire insurance we shall presently consider.

In Brass vs. Stoeser, 153 U. S. 391, Munn vs. Illinois and Budd vs. New York were affirmed. A law of the state of North Dakota was sustained which made all buildings, elevators and warehouses used for the handling of grain for a profit public warehouses, and fixed a storage rate. The case is important. It extended the principle of the other two cases and denuded it of the limiting element which was supposed to beset it—that to justify regulation of a business the business must have a monopolistic character. That distinction was pressed and answered. It was argued, the court said (p. 402), "that the statutes of Illinois and New York [passed on in the Munn and Budd Cases] are intended to operate in great trade centers, where on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are af-

forsaken, while the wide extent of the state of North Dakota and the small population of its country towns and villages are said to present no such opportunities." And it was also urged that the method of carrying on business in North Dakota and the Eastern cities was different, that the elevators in the latter were essentially means of transporting grain from the lakes to the railroads and those who owned them could, if uncontrolled by law, extort such charges as they pleased, and stress was laid upon the expression in the other cases which represented the business as a practical monopoly. A contrast was made between those conditions and those which existed in an agricultural state where land was cheap and limitless in quantity. It was replied that this difference in conditions was "for those who make, not for those who interpret, the laws." And considering the expressions in the other cases which, it was said, went rather to the expediency of the laws, than to their validity, yet, it was further said, the expressions had their value because the "obvious aim of the reasoning that prevailed was to show that the subject-matter of these enactments fell within the legitimate sphere of legislative power, and that, so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law" (p. 404).

The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in *People v. Budd* (117 N. Y. 1, 27), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected cannot be supported. "The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation." Is the business of insurance within the principle? It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past and cannot be applied though modern economic conditions may make necessary or beneficial its application. In other words, to say that government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than government possesses to-day. We proceed then to consider whether the business of insurance is within the principle.

A contract for fire insurance is one for indemnity against loss and is personal. The admission, however, does not take as far in the solution of the question presented. Its personal character certainly does not of itself preclude regulation, for there are many examples of governmental regulation of personal contracts, and

in the statutes of every state in the Union superintendence and control over the business of insurance are exercised, varying in details and extent. We need not particularize in detail. We need only say that there was quite early (in Massachusetts 1837, New York 1853) state provision for what is known as the unearned premium fund or reserve; then came the limitation of dividends, the publishing of accounts, valued policies, standards of policies, prescribing investment, requiring deposits in money or bonds, confining the business to corporations, preventing discrimination in rates, limitation of risks and other regulations equally restrictive. In other words, the state has stepped in and imposed conditions upon the companies, restraining the absolute liberty which businesses strictly private are permitted to exercise.

Those regulations exhibit it to be the conception of the law-making bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. A conception so general cannot be without cause. The universal sense of a people cannot be accidental; its persistence saves it from the charge of unconsidered impulse, and its estimate of insurance certainly has substantial basis. Accidental fires are inevitable and the extent of loss very great. The effect of insurance—indeed, it has been said to be its fundamental object—is to distribute the loss over as wide an area as possible. In other words, the loss is spread over the country, the disaster to an individual is shared by many, the disaster to a community shared by other communities; great catastrophes are thereby lessened, and, it may be, repaired. In assimilation of insurance to a tax, the companies have been said to be the mere machinery by which the inevitable losses by fire are distributed so as to fall as lightly as possible on the public at large, the body of the insured, not the companies, paying the tax. Their efficiency, therefore, and solvency are of great concern. The other objects, direct and indirect, of insurance we need not mention. Indeed, it may be enough to say, without stating other effects of insurance, that a large part of the country's wealth, subject to uncertainty of loss through fire, is protected by insurance. This demonstrates the interest of the public in it and we need not dispute with the economists that this is the result of the "substitution of certain for uncertain loss" or the diffusion of positive loss over a large group of persons, as we have already said to be certainly one of its effects. We can see, therefore, how it has come to be considered a matter of public concern to regulate it, and, governmental insurance has its advocates and even examples. Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals. We may say in passing that when the effect goes beyond that, there are many examples of regulation. Holden vs.

Hardy, 169 U. S. 366; Griffith vs. Connecticut, 218 U. S. 563; Muller vs. Oregon, 208 U. S. 412; Mutual Loan Co. vs. Martell, 222 U. S. 225; Schmidinger vs. Chicago, 226 U. S. 578; Chicago, Burlington & Quincy R. R. Co. vs. McGuire, 219 U. S. 549; Noble State Bank vs. Haskell, 219 U. S. 104.

Complainant feels the necessity of accounting for the regulatory state legislation and refers it to the exertion of the police power, but while expressing the power in the broad language of the cases, seeks to restrict its application. Counsel states that this power may be exerted to "pass laws whose purpose is the health, safety, morals and the general welfare of the people." The admission is very comprehensive. What makes for the general welfare is necessarily in the first instance a matter of legislative judgment and a judicial review of such judgment is limited. "The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the Legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." Chicago, Burlington & Quincy Railroad Co. vs. McGuire, 219 U. S. 549, 569.

The restrictions upon the legislative power which complainant urges we have discussed, or rather the considerations which take, it is contended, the business of insurance outside of the sphere of the power. To the contention that the business is private we have opposed the conception of the public interest. We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositaries of the money of the insured, possessing great power thereby and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world from the earliest times—certainly the sense of the modern world—is of

the greatest public concern. It is, therefore, within the principle we have announced.

But it is said that the reasoning of the opinion has the broad reach of subjecting to regulation every act of human endeavor and the price of every article of human use. We might, without much concern, leave our discussion to take care of itself against such misunderstanding or deductions. The principle we apply is definite and old and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become "clothed with a public interest," and therefore subject "to be controlled by the public for the common good."

If there may be controversy as to the business having such character, there can be no controversy as to what follows from such character if it be established. It is idle, therefore, to debate whether the liberty of contract guaranteed by the Constitution of the United States is more intimately involved in price regulation than in the other forms of regulation as to the validity of which there is no dispute. The order of their enactment certainly cannot be considered an element in their legality. It would be very rudimentary to say that measures of government are determined by circumstances, by the presence or imminence of conditions, and of the legislative judgment of the means or the policy of removing or preventing them. The power to regulate interstate commerce existed for a century before the Interstate Commerce Act was passed, and the commission constituted by it was not given authority to fix rates until some years afterwards. Of the agencies which those measures were enacted to regulate at the time of the creation of the power, there was no prophecy or conception. Nor was regulation immediate upon their existence. It was exerted only when the size, number and influence of those agencies had so increased and developed as to seem to make it imperative. Other illustrations readily occur which repel the intimation that the inactivity of a power, however prolonged, militates against its legality when it is exercised. *United States vs. Delaware & Hudson Co.*, 213 U. S. 366. It is oftener the existence of necessity rather than the prescience of it which dictates legislation. And so with the regulations of the business of insurance. They have proceeded step by step, differing in different jurisdictions. If we are brought to a comparison of them in relation to the power of government, how can it be said that fixing the price of insurance is beyond that power and the other instances of regulation are not? How can it be said that the right to engage in the business is a natural one when it can be denied to individuals and permitted to corporations? How can it be said to have the privilege of a private business when its dividends are restricted, its investments controlled, the form and extent of its

contracts prescribed, discriminations in its rates denied and a limitation on its risks imposed? Are not such regulations restraints upon the exercise of the personal right—asserted to be fundamental—of dealing with property freely or engaging in what contracts one may choose and with whom and upon what terms one may choose?

We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that "it is illusory to speak of a liberty of contract." It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it, that we may discover the inducement of the Kansas statute, and the problem presented is whether the Legislature could regard it of as much moment to the public that they who seek insurance should no more be constrained by arbitrary terms than they who seek transportation by railroads, steam or street, or by coaches whose itinerary may be only a few city blocks, or who seek the use of grain elevators, or be secured in a night's accommodation at a wayside inn, or in the weight of a five-cent loaf of bread. We do not say this to belittle such rights or to exaggerate the effect of insurance, but to exhibit the principle which exists in all and brings all under the same governmental power.

We have summarized the provisions of the Kansas statute, and it will be observed from them that they attempt to systematize the control of insurance. The statute seeks to secure rates which shall be reasonable both to the insurer and the insured, and as a means to this end it prescribes equality of charges, forbids initial discrimination or subsequently by the refund of a portion of the rates, or the extension to the insured of any privilege; to this end it requires publicity in the basic schedules and of all of the conditions which affect the rates or the value of the insurance to the insured, and also adherence to the rates as published. Whether the requirements are necessary to the purpose, or—to confine ourselves to that which is under review—whether rate regulation is necessary to the purpose, is a matter for legislative judgment, not judicial. Our function is only to determine the existence of power.

The bill attacks the statute of Kansas as discriminating against complainant because the statute excludes from its provisions farmers' mutual insurance companies, organized and doing business under the laws of the state and insuring only farm property. The charge is not discussed in the elaborate brief of

counsel, nor does it seem to have been pressed in the lower court. It is however, covered by the assignments of error.

The provision of the statute is, "That nothing in this act shall affect farmers' mutual insurance companies organized and doing business under the laws of this state and insuring only farm property." The distinction is, therefore, between co-operative insurance companies insuring a special kind of property and all other insurance companies. It is only with that distinction that we are now concerned. There are special provisions in the statutes of Kansas for the organization of co-operative companies and if the statute under review discriminates between them the German Alliance Company cannot avail itself of the discrimination. A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a Legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise. *Ozan Lumber Co. vs. Union County National Bank*, 207 U. S. 251. There are certain differences between stock companies, such as complainant is, and the mutual companies described in the bill, and a recognition of the differences we cannot say is outside of the constitutional power of the Legislature. *Orient Insurance Co. vs. Daggs*, 172 U. S. 557.

Decree affirmed.

LAMAR, J. (dissenting).

I dissent from the decision and the reasoning upon which it is based. The case does not deal with a statute affecting the safety or morals of the public. It presents no question of monopoly in a prime necessity of life, but relates solely to the power of the state to fix the price of a strictly personal contract. The court holds that fire insurance though personal is affected with a public interest and therefore, that the business may not only be regulated but that the premium or price to be paid to the insurer for entering into that personal contract can be fixed by law.

The fixing of the price for the use of private property is as much a taking as though the fee itself had been condemned for a lump sum—that taking, whether by fixing rates for the use or by paying a lump sum for the fee, has always heretofore been thought to be permissible only when it was for a public use. But the court in this case holds that there is no distinction between the power to take for public use and the power to regulate the exercise of private rights for the public good. That is the fundamental proposition on which the case must stand, and the decision must therefore be considered in the light of that ruling and of the results which must necessarily flow from the future application of that principle. For if the power to regulate, in the interest of the public, comprehends what is intended in the power to take

property for public use, it must inevitably follow that the price to be paid for any service or the use of any property can be regulated by the General Assembly. This is so because the power of regulation is all-pervading, as witness the statute of frauds, the recording acts, weight and measure laws, pure food laws, hours of service laws, and innumerable other enactments of that class. And if this power be as extensive as is now, for the first time, decided, then the citizen holds his property and his individual right of contract and of labor under legislative favor rather than under constitutional guaranty. The principle is applied here to the case of insurance; but the nature of that business and the intangible character of its contracts are such as to indicate the far-reaching effect of the principle announced, and warrants a statement of some of the grounds of dissent.

Insurance is not production; nor manufacture; nor transportation; nor merchandise. And this court in *N. Y. Life Co. vs. Deer Lodge Co.*, 231 U. S. 495, at the present term, reaffirmed its previous rulings that "insurance is not commerce," "not an instrumentality of commerce," "not a transaction of commerce," "but simply contracts of indemnity against loss by fire." Such a contract is personal and in the state whose statute is under consideration, insurance companies are classed among those "strictly private." *Leavenworth County vs. Miller*, 7 Kansas, 479, 520. The fact, that insurance is a strictly private and a personal contract of indemnity puts it on the extreme outside limit and removes it as far as any business can be from those that are in their nature public. So that if the price of a private and personal contract of indemnity can be regulated,—if the price of a chose in action can be fixed,—then the price of everything within the circle of business transactions can be regulated. Considering, therefore, the nature of the subject treated and the reasoning on which the court's opinion is based, it is evident that the decision is not a mere entering wedge, but reaches the end from the beginning and announces a principle which points inevitably to the conclusion that the price of every article sold and the price of every service offered can be regulated by statute.

And such laws are not without English precedent. For while no statute ever before attempted to fix the price of a contract of indemnity, yet under a Parliament that sat as a perpetual constitutional convention, with power to pass bills of attainder, to take property for private purposes and to take it without due process of law, many statutes approaching that now under review were adopted and enforced. Acts were passed by Parliament fixing the price of many commodities that were convenient or useful. These laws did not stop at fixing the price of property, but, like the present act they fixed the price of private contracts, and, by statute prescribed the rate of wages, and made it unlawful for the employee to receive or for the employer to give

more than the wage fixed by law. It is needless to say that these laws were felt to be an infringement upon the rights of men; that they were bitterly resisted by buyer and seller, by employer and employee, and were a source of perpetual irritation often leading to violence. But the fact that the English Parliament had the arbitrary power to pass such statutes made them valid in law, though they were in violation of the inherent rights of individuals. In time, the great injustice in this, was so far recognized that these laws, fixing the price of strictly private contracts, seem to have been repealed, and Lord Ellenborough, while enforcing, as proper, a rate for *public* wharfs, was able to say, in Allnutt vs. Inglis, 12 East, 527, 538, "that the general principle is favored both in law and justice, that every man may fix what price he pleases for his own property or the use of it." But what was a favor in England, that might at any time be withdrawn, was in this country made a constitutional right that could not be withdrawn. For although the practice of fixing prices may have prevailed in some of the Colonies "up to the time of independence," yet, as Judge Cooley says, since independence "it has been commonly supposed that a general power in the state to regulate prices was inconsistent with constitutional liberty." Cooley's Const. Law (7th ed.) 807; Stickney's State Control of Trade, p. 3 and the abstract of English price-fixing statutes, p. 9 *et seq.* That common supposition is rightly founded on the fact that the Constitution recognizes the liberty to contract and right of private property. They include not only the right to make contracts with which to acquire property, but the right to fix the price of its use while it is held, and the further right to fix the price if it is to be sold. To deprive any person of either is to take property, since there can be no liberty of contract and true private ownership if the price of its use or its sale is fixed by law. That right is an attribute of ownership. State Tax Case, 15 Wall. 232, 278, top.

But it may be said that, though insurance is a contract of indemnity and personal, its personal character has not been thought to preclude the many regulatory measures adopted and sustained during the past hundred years.

This is most freely conceded. But it is equally true that the failure for more than one hundred years to attempt to fix the rates of insurance is indubitable evidence of the general public and legislative conception that the business of insurance did not belong to the class whose rates could be fixed. That settled usage is not an accident. For rate making is no new thing, and neither is insurance. Its use in protecting the owner of property against loss; its value as collateral in securing loans; its method of averages and distributing the risk between many persons widely separated and all contributing small premiums in return for the promise of a large indemnity,

has been known for centuries. All these considerations were recently pressed upon the court in an effort to secure a ruling that insurance was commerce. In refusing to accede to the sufficiency of the argument, the court in the Deer Lodge Case pointed out that the size of the business of insurance did not change the inherent nature of the business itself, saying that "the number of transactions do not give the business any other character than magnitude."

The character of insurance, therefore, as a private and personal contract of indemnity, has not been changed by its magnitude or by the fact that more policies and for greater amounts are now written than in the centuries during which no effort has ever before been made to fix their rates. It is, however, undoubtedly true that during all of that period *regulatory statutes* were from time to time, adopted to protect the public against conditions and practices which were subject to regulation. The public had no means of knowing whether these corporations were solvent or not, and statutes were passed to require a publication of the financial condition. The policies were long and complicated, with exceptions, and qualifications, and provisos. They were often unread by the policyholder and sometimes not understood when read. Statutes were accordingly passed providing for a standard form of policy in order to protect the assured against his inexperience, to prevent hard bargains, and to avoid vexatious litigation, and as similar evils appear they may be dealt with by regulatory or prohibitory legislation just as statutes were passed and can still be passed to punish combinations, pooling arrangements, and all those practices which amount to unfair competition.

But these and those referred to in Attorney-General vs. Firemen's Insurance Co., 74 N. J. Eq. 372, furnish instances of the exercise of this power to regulate which can be exerted against any person, trade or business, no matter how great or small. This power to regulate is so much oftener exerted against the large business, because the evils are then more apparent, that the size of the business and the number of persons interested is sometimes referred to as indicating that the business is affected with a public interest. But there is no such limitation. For the power to regulate is the essential power of government which can be exerted against the whole body of the public or the smallest business. And if, as seems to be implied, the fact that a business may be regulated is to be the test of the power to fix rates, it would follow, since all can be regulated, the price charged by all can be regulated. Or if great size is the test, if the number of customers is the test, if the scope of the business throughout the nation is the test, if the contributions of the many to the value of the business is the test—or if it takes a combination of all to meet the condition,—then every business with great capital and

many customers distributed throughout the country and making a large business possible, must be treated as affected with a public interest, and the price of the goods on its shelves can be fixed by law. Then could the price of newspapers, magazines and the like be fixed, because certainly nothing is more affected with a public interest, nothing is so dependent on the public, nothing reaches so many persons and so profoundly affects public thought and public business. Such a business is, indeed, affected with a public interest,—justifying regulation (*Lewis Publishing Co. vs. Morgan*, 229 U. S. 288), but not the fixing of the price of the paper or periodical or the rates of advertising. For great and pervasive as is the power to regulate, it cannot override the constitutional principle that private property cannot be taken for private purposes. *Missouri Pacific vs. Nebraska*, 164 U. S. 403. That limitation on the power of government over the individual and his property cannot be avoided by calling an unlawful taking a reasonable regulation. Indeed, the protection of property is an incident of the more fundamental and important right of liberty guaranteed by the Constitution and which entitled the citizen freely to engage in any honest calling and to make contracts as buyer or seller, as employer or employee, in order to support himself and family.

It is said, however, that the validity of rates statutes has often been recognized, notably in the *Munn Case* (94 U. S. 113, 126) where a statute was sustained which regulated the price to be charged for storing grain in elevators.

The *Munn Case* is a landmark in the law. It is accepted as an authoritative and accurate statement of the principle on which the right to fix rates is based. But the statute there under review did not undertake to fix the price of a personal contract, but to fix the price for the use of property, once private, but then public. The reasoning of the court clearly shows that in order to regulate rates, two things must concur—(1) the business must be affected with a public interest; and (2) the property employed in such business must be devoted to a public use. The basic principle of the decision was the oft quoted saying of Lord Hale that "when private property is affected with a public interest, it ceases to be *juris privati* only." The decision in the *Munn Case* was but an application of that terse statement and was applied in a case where the elevators had been devoted to a public use. This will distinctly appear from the statement by the court of the question involved and decided. For after reviewing and applying Lord Hale's pithy saying and reviewing the other authorities the court said (italics ours):—

"Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of

these plaintiffs in error, and the business which is carried on *there*, come within the operation of this principle" (p. 130).

Not only does the Munn Case show that the right to fix prices depends on the concurrence of public interest and the employment of property devoted to a public use, but with the exception of the Louisiana Bread Case, 12 La. Ann. 432, it is believed that every American rate statute since the requirement that property should not be taken without due process of law, related to a business which was public in its character and employed visible and tangible property which had been devoted to a public use.

The list of rate regulated occupations is not too long to be here given. It includes canals, waterways and booms; bridges and ferries; wharves, docks, elevators and stockyards; telegraph, telephone, electric, gas and oil lines; turnpikes, railroads and the various forms of common carriers, including express and cabs. To this should be added the case of the innkeeper (as to which no American case has been found where the constitutional question as to the right to fix his rates has been considered), the confessedly close case of the irrigation ditches for distributing water (189 U. S. 439), and the toll mill acts. This of course does not include the case of condemnation for governmental purposes or for roads and ways where no question of rates is involved. There may be other instances not found, but it is believed that the foregoing enumeration exhausts the list of what has heretofore been treated as a public business justifying the exercise of the price-fixing power against persons or corporations.

It is to be noted that in each instance the power to regulate rates is exercised against a business which in every case used tangible property devoted to a public use. Some of them had a monopoly (*Spring Water Co. vs. Schottler*, 110 U. S. 347, 354). Some of them had franchises. Most of them used public ways or employed property which they had acquired by virtue of the power of eminent domain. They were therefore subject to the correlative obligation to have the use, of what had been thus taken by law, fixed by law. And as further pointing out the characteristics of the public use justifying the fixing of prices, it will be noted that, with the exception of toll mills (which, however, do employ property devoted to a public use), they all have direct relation to the business or facilities of transportation or distribution—to transportation by carriers of passengers, goods or intelligence by vehicle or wire;—to distribution of water, gas or electricity through ditch, pipe or wire; to wharfage, storage or accommodation of property before the journey begins, when it ends, or along the way.

When thus enumerated, they appear to be grouped around the common carrier as the typical public business and all employing in some way property devoted to a public use.

It will be seen, too, that the size of the business is unimportant, for the fares of a cabman, employing a broken-down horse and a dilapidated vehicle can be fixed by law as well as the rates of a railroad with millions of capital and thousands of cars transporting persons and property across the continent.

The fact that rate statutes, enacted and sustained since the adoption of constitutional government in this country, all had some reference to transportation or distribution, is a practical illustration of the accepted meaning of "public use" when that phrase was first employed in American constitutions, and when turnpikes and carriers, wharfingers and ferrymen had rates, tolls and fares fixed by law. No change was made in the meaning of the words or in the principle involved when it opened to take in new forms and facilities of transportation, whether by vehicle, pipe or wire, and new forms of storage, whether on the wharf or in the grain elevator.

But it is said that business is the fundamental thing and the property but an instrument, and that there is no basis for the distinction between a public interest and a public use. But there is a distinction between a public interest—justifying regulation—and a public use—justifying price fixing. "Public interest and public use are not synonymous." *In re Niagara Falls Ry. Co.*, 138 N. Y. 375, 385. And since the case here involves the validity of a Kansas statute it is well to note that the Supreme Court of that state in *Howard vs. Schwartz*, 77 Kansas, 599, recognizes that there is a difference and adjudges accordingly. It there cited numerous decisions from other states and in defining a public use, made the following quotation from the opinion of the Supreme Court of Maine:—

"Property is devoted to a public use when, and only when, . . . all the public has a right to demand and share in" it ". . . In a broad sense it is the right in the public to an actual use, and not to an incidental benefit." (p. 608).

The effect of the difference between public use and public interest appears from the application; for the Supreme Court of Kansas on the authority of this and numerous other cases, held that a steam flour mill was not such a public use as would authorize its owners to exercise the power of eminent domain, though it was "a useful and important business instrumentality which contributed to the growth and development of the locality where the [mills] are situated. This may also be said, however, of every legitimate business. To a limited extent every honest industry adds to the general sum of prosperity and promotes the public welfare" (p. 609).

Nothing more can be said of insurance—nor can the power to take the private property of insurers, by fixing rates, be enlarged by a legislative declaration that the business is affected with a broad and definite public interest. For since the contract of in-

surance is private and personal, it is almost a contradiction in terms to say that the private contract is public or that a business which consists in making such private contracts is public in the constitutional sense. The fundamental idea of a public business, as well declared by the Supreme Court of Kansas, 77 Kansas, 608, is that "all the public has a right to demand and share in" it. That means that each member of the public on demand and upon equal terms, without written contract, without haggling as to terms, may demand the public service, and secure the use of the facility devoted to public use. If the company can make distinctions and serve one and refuse to serve another, the business *ex vi termini* is not public. The common carrier has no right to refuse to haul a passenger even if he has been convicted of arson. But if an insurance company is indeed public it is bound to insure the property of the man who is suspected of having set fire to his own house, or whose statements of value it is unwilling to take. This is manifestly inconsistent with the contract of insurance which requires the utmost good faith, not only in making truthful answers to questions asked, but in not concealing anything material to the risk. If the company has the discretion to insure or the right to refuse to insure, then, by the very definition of the terms, it is not a public business. If, on the other hand, the company is obliged to insure bad risks or the property of men of bad character, of doubtful veracity or known to be careless in their handling of property the law would be an arbitrary exertion of power in compelling men to enter into contract with persons with whom they did not choose to deal where confidence is the very foundation of a contract of indemnity. Indeed, it seems to be conceded that a person owning property is not entitled to demand insurance as a matter of right. If not, the business is not public and not within the provision of the Constitution which only authorizes the taking of property for public purposes—whether the taking be of the fee for a lump sum assessed in condemnation proceedings, or whether the use be taken by rate regulation, which is but another method of exercising the same power.

The suggestion that the public interest is found in the characteristics of the business of insurance, justifies a brief examination of those characteristics and a statement of the results that logically must follow from such a test. For if the power is to develop out of the characteristics, it must necessarily follow that other occupations, having similar characteristics, must be subject to the same rate regulating power.

The elements which are said to show that insurance is affected with a public interest do not arise out of the size of any one company, but out of the volume of the aggregate business of all the companies doing business within the state and beyond its borders. If that test applied, and if the sum of the units is

to determine whether or not a business is affected with a public interest (which is said to be the equivalent of a public use), then if the principle of the decision be applied to the business of farming all can see to what end it leads. In view of the amount of property employed and the aggregate number of persons engaged in agriculture and the public's absolute dependence upon that pursuit, it would follow that, farming being affected with a broad and definite public interest, the price of wheat and corn; cotton and wools; beef, pork, mutton and poultry; fruit and vegetables, could be fixed. Or if we take the aggregate of those who labor and consider the public's absolute dependence upon labor, it would inevitably follow that it, too, was affected with a broad and definite public interest and that wages in the United States of America in this twentieth century could be fixed by law, just as in England between the fourteenth and eighteenth centuries. And inasmuch as the prices of agricultural products are dependent on the price of land and labor, and as the price of labor is closely related to the cost of rent and food and clothes and the comforts of life, there would be the power to take the further step and regulate the cost of everything which enters into the cost of living. Of course, it goes without saying that if the rates for fire insurance can be fixed, then the rates for life and marine insurance can be fixed. By a parity of reasoning the rates of accident, guaranty and fidelity insurance could also be regulated. There seems no escape from the conclusion that the asserted power to fix the price to be paid by one private person to another private person or private corporation for a private contract of indemnity, or for his product, or his labor, or for his private contracts of any sort, will become the center of a circle of price-making legislation that, in its application, will destroy the right of private property and break down the barriers which the Constitution has thrown around the citizen to protect him in his right of property—which includes his right of contract to make property, his right to fix the price at which his property shall be used by another. By virtue of the liberty which is guaranteed by the Constitution, he also has the right to name the wage for his labor and to fix the terms of contracts of indemnity,—whether they be contracts of endorsement or suretyship, or contracts of indemnity against loss by fire, flood, or accident.

In view of what Judge Cooley calls the general supposition that "the right to fix prices was inconsistent with constitutional liberty," it is not surprising that little is to be found in the books relating to a statute like this. It is, however, somewhat curious that among the few expressions to be found on the subject, is the intimation by Lord Ellenborough in *Allnutt vs. Inglis*, 12 East, 527, 535, that insurance rates were not on the same basis as a public business using property devoted to a public use. For in

answering the argument that if the rates of a public wharf could be fixed, insurance rates could also be fixed, he clearly intimates that this could not be done, since the wharf was a monopoly and "the business of insurance and of counting houses may be carried on elsewhere."

In the following cases the statutes fixing prices have been held to be void. *Ex parte Dickey*, 144 California, 234, fixing the price to be charged by an employment bureau; *Ex parte Quarg*, 149 California, 79; *People vs. Steele*, 231 Illinois, 340, prohibiting the sale of theater tickets at a price higher than that charged by the theater; *State vs. Fire Creek Coke Co.*, 33 West Va. 188, limiting the profits on sales to employees. See also *State vs. McCool*, 83 Kansas, 428, 430, bot., where in sustaining a statute regulating the weight of bread the court called attention to the fact that the statute did not attempt to fix the price. To these could be added a multitude of decisions showing that the power to regulate is limited by the constitutional prohibition against the taking of private property. *Guillotte vs. New Orleans*, 12 La. Ann. 432, is the only American case found which sustains the right to fix prices for other than a commodity or service furnished by a public utility company of the kind already pointed out. In that case the court said that the city could fix the price of bread and that if the baker did not desire to do business within the limits of such city he could go elsewhere. That reasoning would support any statute, for every citizen at least has the right to go out of business. But it has been repeatedly held by this court that such an answer cannot sustain an invalid statute, the Constitution being intended to secure the citizen against being driven out of business by an unconstitutional statute or regulation.

There is, in the opinion, an allusion to usury laws as instances of fixing rates for other than public service corporations. We do not understand that the opinion is founded on that proposition, for even the usury laws do not fix a flat rate, but only a maximum rate, and did not require lenders to make loans to all borrowers, similarly situated, at the same rate of interest. Moreover, interest laws were in their inception not a restriction upon the right of contract but an enlargement, permitting what theretofore had been regarded both as an ecclesiastical and civil offense. This fact may have been coupled with the idea that as the sovereign had the prerogative to coin money and make legal tender for all claims he could fix the price that should be charged for the use of that money.

At any rate, interest laws had been long recognized before the Constitution and have been prevalent ever since. They, therefore, fall within the rule that contemporary practice, if subsequently continued and universally acquiesced in, amounts to an interpretation of the Constitution. But the same character of long continued acquiescence and settled usage that sustains a

usury law also sustains the right of the contracting parties to agree upon the charge for insurance. For centuries before the Constitution, and continuously ever since they have themselves fixed the charge, and this makes most strongly in favor of their right to continue to agree upon the price of a private contract of indemnity against loss by fire.

The act now under review not only takes property without due process of law but it unequally and arbitrarily selects those from which such property shall be taken by price fixing. Although including all other fire insurance companies, it excepts certain mutual insurance companies. Persons engaged in doing an insurance business are not within its terms. In Kansas, the right to do a fire insurance business is not limited to corporations, but may be conducted by persons, individuals, partners, companies and associations, whether incorporated or not. General Statutes of Kansas (1909), §§ 4086, 4091, 4122. And if it could be true that the Legislature could fix the price of insurance it would seem to be doubly necessary that all doing an insurance business should be treated alike. There is no difference in principle and none by statute in the character of the contract, whether it is made by one man, or the Lloyds, or a corporation. There is no difference in the character of the contract made by a stock company and a mutual company. In each instance the contract is one of indemnity against loss for a fixed premium. If the policyholder is a stockholder in an ordinary corporation, he may get back some of his premium by way of dividends; if he is a member of a mutual company, he pays his premium and gets back his share of the earnings. But to say that the state may fix the price to be charged for insurance by a stock company and that it will not fix the price to be charged by mutual companies or by the Lloyds, who do an enormous business of exactly the same nature on exactly the same sort of property and on exactly the same terms, is to make a discrimination which amounts to a denial of the equal protection of the law.

The Chief Justice and Mr. Justice Van Devanter concur in this dissent.

UNITED STATES DISTRICT COURT.**N. D. NEW YORK.****ROBINSON****vs.****WESTERN ASSUR. CO.*****1. INSURANCE—FIRE POLICY—CONDITIONS.**

A provision in a fire policy that, if the premiums were not paid within sixty days from the date of the attachment of the insurance, the policy should be void during the time the premiums were past due and unpaid should be construed to mean voidable at the election of the insurer, and not void.

(For other cases, see Insurance, Cent. Dig. §§ 891, 895-902, 913; Dec. Dig. § 349.)

2. INSURANCE — FIRE POLICY — PREMIUM — DEFAULT — WAIVER.

A fire policy was issued to plaintiff, covering a launch, May 9, 1912, providing that it should be void if the premium was not paid within sixty days from date of the attaching of the risk and during the time the premium remained due and unpaid. The policy attached May 31st following. On August 12th payment was demanded, and on September 23d the insurer's general agent wrote that, unless remittance was received on or before October 1st, notice of cancellation would be served. No notice of cancellation was served, however, until, on October 15th, the agent wrote to plaintiff notifying him of cancellation, but during the night of the 16th, and before notice of cancellation was received by plaintiff on the 19th, the boat was lost. Held, that such facts were sufficient to show a waiver of the insurer's right to cancel the policy for nonpayment of premium when due.

(For other cases, see Insurance, Cent. Dig. §§ 1037, 1038; Dec. Dig. § 390.)

At law. Action by Ernest J. Robinson against the Western Assurance Company, on a policy of fire insurance. Verdict having been returned for plaintiff, defendant moves for a new trial. Denied.

Weeds, Conway & Cotter, of Plattsburgh, N. Y. (Frank E. Smith, of New York City, of counsel), for Plaintiff.

Carpenter & Park, of New York City (Donald F. McLennan, of Syracuse, N. Y., and Henry E. Mattison, of New York City, of counsel), for Defendant.

RAY, D. J.

About May 9, 1912, the defendant, a foreign corporation, through its general manager in the United States, one E. S. Kelley, issued to the plaintiff, Ernest J. Robinson, a policy of insurance on the hull, tackle, etc., of his gasoline launch "Dan." It

* Decision rendered, March 16, 1914. 211 Fed. Rep. 747.

was issued in consideration of a premium of \$131.25, and contained the following:—

"It is agreed that should the premiums on this policy be not paid within sixty days from date of attaching, the policy shall be null and void during the time the premium is past due and unpaid."

The plaintiff obtained this policy through one Carl H. Oliver, who, in this transaction, was an insurance broker only, and who obtained it from Kelley, the general agent of the defendant. Oliver was not Kelley's agent and did not represent him, nor was he the agent of the defendant. The policy was sent to Oliver by Kelley, and by Oliver delivered to the plaintiff about May 6, 1912, and was a valid delivery. Robinson did not pay the premium to the defendant, or to Kelley, or to Oliver at that time, but later gave his note to Oliver. Kelley knew the premium was not paid, and by letter urged payment on at least three different occasions. October 1, 1912, Oliver wrote Kelley that Robinson would pay the 10th of the month. That, of course, informed Kelley that the premium was not yet paid to Oliver. October 15, 1912, Kelley wrote Oliver that, as the premium was not paid, he was sending notice of cancellation of the policy, but would be glad to reinstate the same on payment of the premium. This letter of notice of cancellation to Oliver was received by him at about two o'clock p. m. on October 17, 1912, but Kelley's letter of cancellation sent to Robinson was not received until October 19, 1912. During the night of October 16, 1912, the boat "Dan" was destroyed by fire and sank. Whether she was a total loss or not was a question of fact submitted to the jury. On the 18th of October the defendant company was notified by telegram of the loss. Kelley was also notified, but denied liability. In August, 1912, Kelley had reported to the defendant company the issuing and delivery of this policy to Robinson, and reported it as outstanding policy, and also charged himself with the amount of the premium in his account with the defendant company and actually remitted it. Later, and in December, after the fire, on learning that Kelley had not received the premium from Oliver or Robinson, the premium was returned.

The court charged the jury that the premium was not paid; that Oliver was not the agent of Kelley or of the defendant; that the defendant company had the right, through its agent Kelley, to waive the provision that the policy should become null and void after sixty days from the date of attaching in case the premium was not paid, and treat the policy as valid, outstanding, and binding, notwithstanding such nonpayment. The court charged:—

"If the insurance company did so waive the provisions and did so recognize and treat the policy as valid and subsisting and outstanding, and if the plaintiff only received the letter canceling

the policy after the fire, then you will come to the question of damages."

The court said and finally charged:—

"Now, gentlemen, I charged you and I charge you again; of course during the sixty days that policy was valid whether the premium was paid or not. After the sixty days had run, from the time it attached, and it was after that that the fire occurred, whether this was a valid and binding policy and contract of insurance in force would depend on whether or not the defendant company, through its agent Kelley; who I told you had the power in that regard, waived the nonpayment of the premium by having reported it, paying it over, and by writing on two or three occasions, I think three, at different dates, asking payment of the entire premium, treating it as due, and saying nothing at all about this condition, and not giving any notice that they elected to treat the policy as void, or would if the premium was not paid, not calling attention to it, under all these facts and those that I called attention to as I read it here (I will not repeat it), by those acts and letters waived that condition which defendant had a right to do. The question is: Did it? That is for you to say. If the defendant, through Kelley, did so waive that provision and treat the policy as valid and in force, notwithstanding that non-payment, and waived it, the plaintiff is entitled to recover. If the defendant, through Kelley, did not waive it, that ends this case, and the plaintiff cannot recover, and your verdict should be for the defendant."

The court also charged that, if the notice of cancellation sent Robinson was received prior to the fire, he could not recover.

[1] I think it is fairly well settled that such a condition in a policy meant not "absolutely void" but "voidable at the election of the insurer." *Grigsby vs. Russell*, 222 U. S. 149, 32 Sup. Ct. 58, 56 L. Ed. 133, 36 L. R. A. (N. S.) 642, Ann. Cas. 1913B, 863; *Knickerbocker Life Ins. Co. vs. Norton*, 96 U. S. 234, 24 L. Ed. 689; *Oakes vs. Manufacturers' Fire & Marine Ins. Co.*, 135 Mass. 248.

In *Grigsby vs. Russell*, *supra*, which reverses 168 Fed. 577, 94 C. C. A. 61, the Supreme Court said:—

"But a condition in a policy that it shall be void if premiums are not paid when due means only that it shall be voidable at the option of the company."

[2] So the right which this defendant company undoubtedly had to avoid the policy for nonpayment of the premium could be waived. Waiver has nothing to do with this case, if the clause referred to operates to make the policy ipso facto null and void in case the premium was not paid within the sixty days from date of attaching. A policy which had become null and void could not be renewed by waiver. The very language of the condition quoted

plainly indicates that the policy is not to become void in case the premium is not paid. It is to be null and void; that is, inoperative during the time the premium is past due and unpaid. Further credit can be given; the policy can remain in force by consent, by waiving immediate payment (that is, extending further credit). And here Kelley treated the policy as a valid policy in force by writing at least three times for the payment of the premium, by reporting it as valid and outstanding, and by himself advancing the premium to the company, and by finally giving notice that it was canceled for nonpayment of the premium, thus ending the credit. The policy attached May 31, 1912. July 31, 1912, the premium was due. August 12, 1912, Kelley wrote for the premium. September 23, 1912, Kelley again wrote for the premium, and said:—

"This premium is long past due, and unless remittance is received on or before October 1st, we will be under the necessity of serving cancellation notice on the assured for nonpayment."

October 1st Oliver telegraphed Kelley:—

"Will pay the 10th of month."

The matter ran until October 15th, when Kelley wrote Robinson:—

"You will please take notice that the premium of \$135.25 on policy No. 1375, of the Western Assurance Company, dated May 31, 1912, has not been paid. Owing to the failure on your part to pay said premium, I herewith notify you that the policy is canceled according to its conditions, and the company will not be liable for any loss under said policy. E. S. Kelley,

"Agent Western Assurance Company."

Kelley's letter to Oliver of the same date reads:—

"We beg to advise you that inasmuch as the premium on the Western Assurance policy #1375, covering motor boat of Mr. Ernest J. Robinson has not been paid, we are to-day serving notice of cancellation on the assured for nonpayment of premium. We will of course be very glad to reinstate the policy upon receipt of the premium.

"Yours very truly."

It is impossible to conclude otherwise than that this policy was regarded as valid and in force until the notice of cancellation was given. If it was void for nonpayment of the premium, why give notice that it would be declared void, etc., and then why say, "Notify you that the policy is canceled," etc.? I think Washoe Tool Mfg. Co. vs. Hibernia Ins. Co., 7 Hun, 74, affirmed 66 N. Y. 613, Robinson vs. Pacific Ins. Co., 18 Hun, 395, and Titus vs. Glens Falls Ins. Co., 81 N. Y. 410, are substantial authority to the effect that nonpayment of the premium did not make this

policy void, and that it was competent for the company to waive the nonpayment and continue it in force.

The evidence is clearly sufficient to sustain the finding of the jury that this company waived the nonpayment of the premium and treated and regarded the policy as valid, in force, and outstanding down to the time the notice was given. The policy was delivered without payment of the premium; it was left outstanding, and repeated and unconditional demands of payment of the premium were made; the general agent and the defendant company, the insurer, dealt with each other on the theory and basis that the policy was valid and outstanding; and the notice of cancellation sent October 15th, which assumed a valid outstanding policy and that notice of cancellation was necessary, demonstrates the understanding of the company. This demand was for the entire premium, that earned and that unearned, and, as the entire premium was the consideration for the continuance of the policy for the entire term, it seems to me that the demand for the payment of such premium was a plain recognition, not only that the policy was in force, but that it would be kept in force at least until notice to the contrary. Kelley, the general agent, had power to waive the payment of the premium. *Wood vs. P. I. Ins. Co.*, 32 N. Y. 619; *Boehm vs. W. Ins. Co.*, 35 N. Y. 131, 90 Am. Dec. 787; *M. & M. Ins. Co. vs. Armstrong*, 145 Ill. 469, 34 N. E. 553.

I do not think it was error to admit the evidence as to the transactions between the defendant company and its general agent in the United States, Kelley. It was not allowed to have any improper influence on the jury. I think this was a proper case for determination by a jury; that questions of fact were presented; that there was evidence to sustain the findings made; and that a new trial should be denied.

So ordered.

UNITED STATES CIRCUIT COURT OF APPEALS.**SECOND CIRCUIT.****MARQUEE*****vs.*****INSURANCE CO. OF NORTH AMERICA****KLINE BROS. & CO.*****vs.*****LIVERPOOL & LONDON & GLOBE INS. CO., LIMITED.
(Nos. 117, 118.)*****1. CORPORATIONS—OFFICERS—PRESIDENT—AUTHORITY.**

The president of a private corporation by virtue of his office alone has no power to bind the corporation by his contracts, but his power to contract on behalf of the corporation must be found in its organic law, or in a delegation of authority from it, either directly or through its board of directors formally expressed or implied from habit or custom of doing business.

(For other cases, see Corporations, Cent. Dig. §§ 1611-1614; Dec. Dig. § 406.)

2. CORPORATIONS — CONTRACT — EXECUTION — RATIFICATION—BURDEN OF PROOF.

Where the acting president of a private corporation, without authority, obtained certain fire insurance on its behalf on which the corporation subsequently sought to recover, the burden of proof of ratification of his act in making the contract was on the corporation.

(For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1735, 1737, 1743, 1762; Dec. Dig. § 432.)

3. CORPORATIONS — POLICY — CONTRACT — RATIFICATION.

Where the acting president of a private corporation without authority procured certain insurance for it, whether particular facts relied on amounted to a ratification of his act by the corporation was a question of law for the court.

(For other cases, see Corporations, Cent. Dig. §§ 1706, 1719, 1738-1744; Dec. Dig. § 433.)

4. CORPORATIONS—UNAUTHORIZED ACTS OF PRESIDENT—RATIFICATION.

Where the acting president of a private corporation obtained insurance on its behalf, without authority, his act in tendering to the agent of the insurance company an amount equal to the premium due on the policy did not amount to a ratification of his act in making the contract for the policy by the corporation, under the rule that the party

* Decision rendered, Feb. 17, 1914. 211 Fed. Rep. 903.

to ratify the act of an agent made for its benefit must be the party who had authority to make the contract in the first instance.

(For other cases, see Corporations, Cent. Dig. §§ 1596, 1702-1704, 1707, 1708, 1710-1716; Dec. Dig. § 426.)

5. CORPORATIONS—CONTRACTS—ACTS OF OFFICERS—RATIFICATION—MODE.

Where a corporation's articles and by-laws provided that the power to make all contracts, or obligations, of any kind rested with the board of directors acting jointly, but that the directors, with the consent of each and all members of the board in writing might agree to and transact any business specified in the writing without actually holding a meeting for that purpose, the unauthorized act of the corporation's acting president in obtaining insurance for the corporation could only be ratified in the mode prescribed.

(For other cases, see Corporations, Cent. Dig. §§ 1596, 1702-1704, 1707, 1708, 1710-1716; Dec. Dig. § 426.)

6. CORPORATIONS — INSURANCE — CONTRACT — POLICY— RATIFICATION BY INSURED.

Where the acting president of a private corporation obtained insurance for it without authority, the fact that G. & Co., after a loss, assuming to act as adjusters for the corporation, notified the insurance company of the loss, to which the latter replied that its Southern manager would look after the adjustment, did not constitute a ratification of the policy on the part of the corporation, in the absence of proof that G. & Co. were authorized by the corporation to do what they did, nor did the insurer's reply to the notice constitute a recognition of the policy; it appearing that at the time it had no knowledge of the facts constituting its invalidity.

(For other cases, see Corporations, Cent. Dig. §§ 1596, 1702-1704, 1707, 1708, 1710-1716; Dec. Dig. § 426; Insurance, Cent. Dig. §§ 263, 264; Dec. Dig. § 142.)

7. INSURANCE — POLICY — VALIDITY — RATIFICATION — WITHDRAWAL BY INSURER.

Where the acting president of a private corporation, without authority, obtained insurance for it, and his act in doing so was not ratified prior to loss, the insurer prior to ratification was entitled to withdraw from the contract, and did so by giving notice that it elected to treat the policy as void from the beginning.

(For other cases, see Insurance, Cent. Dig. §§ 534-536; Dec. Dig. § 247.)

In Error to the District Court of the United States for the Southern District of New York.

Actions by Julius Marqusee against the Insurance Company of North America and by Kline Bros. & Co. against the Liverpool & London & Globe Insurance Company, Limited. Judgment for defendant in each case, and plaintiffs bring error. Affirmed.

Before Lacombe, Ward, and Rogers, C. JJ.

Fried & Czaki, of New York City (Marion Erwin and Frederick M. Czaki, both of New York City, of counsel), for Plaintiff in Error.

Evins, Mason, Wolff & Hoguet, of New York City (Theodore A. Hammond, of Atlanta, Ga., Robert L. Hoguet and Randolph W. Childs, both of New York City, of counsel), for Defendant in Error.

ROGERS, C. J. (after stating the facts as above).

The question presented in this case involves the validity of a contract of fire insurance.

A charter having been granted by the state of Florida incorporating Kline Bros. & Co., an organization meeting was held on December 16, 1908, at which by-laws were adopted and the directors were chosen. Immediately thereafter the directors met and elected one McIntosh president. On March 8, 1909, the stockholders met and new directors were chosen who subsequently met and elected Morris Kline president. The newly elected officers demanded the books, records, and property of the company, which demand was not complied with by the old officers, who insisted that the new officers had not been duly elected. While this dispute was pending, McIntosh, who was still acting as president, applied to the defendant's agent for insurance, and on the same day the policy in suit was made out and delivered. Three days later the warehouse in which the subject of the insurance was stored was destroyed by fire. The premium had not then been paid, but within a week after the fire McIntosh tendered the premium, which was refused. The defendant has set up several grounds of defense, one of which is that McIntosh had no authority to negotiate the insurance.

[1] It is quite immaterial whether McIntosh at the time he undertook to contract for the insurance was de facto or de jure president. So far as his authority to make the contract is concerned, this case is not different in its material facts from that of *Marqusee vs. Hartford Fire Insurance Co.*, 198 Fed. 475, 119 C. C. A. 251, 42 L. R. A. (N. S.) 1025, in which this court decided that McIntosh was not empowered to make a contract of insurance binding on Kline Bros. & Co. The law is well settled that the president of a private corporation has not, by virtue of his office alone, power to bind the corporation by his contracts. His power to do so must be found in the organic law of the corporation or in a delegation of authority from it directly or through its board of directors formally expressed, or implied from a habit or custom of doing business. The charter conferred no contractual power on the president, and the by-laws provided that all contracts should be made by the board of directors. The contract of insurance was never authorized by the directors. And there was no evidence that by custom the president had been recognized or held out by the corporation or even by the directors as authorized to make contracts. It was urged that he had previously entered into contracts of insurance, but it did not appear that they had not been authorized by the board.

(2, 3) As McIntosh had no authority to contract with the defendant for insurance upon the property destroyed, we must inquire whether the unauthorized contract subsequently became effective by ratification. The burden of proving ratification rests

upon the party who sets up the contract. *Moffitt-West Drug Co. vs. Byrd*, 92 Fed. 290, 34 C. C. A. 351; 34 Cyc. 351; *The Accamee* (C. C.) 12 Fed. 345; *Mississippi, etc., Steamship Co. vs. Swift*. 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545. And whether the particular facts relied upon amount to a ratification of the contract is a question for the court. *Dickson vs. Bamberger*, 107 Ala. 293, 18 South. 290.

The legal existence of the corporation in the case at bar dates from August 31, 1908; that being the time when the letters patent were issued by the Governor and Secretary of State of Florida.

The contract, or alleged contract, of insurance was entered into on March 16, 1909.

The question therefore does not arise whether a corporation not in existence at the time the policy was issued can, upon coming into existence, ratify a contract so made. It has been held in many cases that it is necessary for a valid ratification that the principal should have been in existence at the time the unauthorized act was done.

In *Whitney vs. Wyman*, 101 U. S. 392, 25 L. Ed. 1050, the corporation was in existence when the contract was made, although not having a right at that time to do business as its articles of association had not been filed. Subsequently it ratified the contract and the court held it valid.

[4] It was admitted at the trial in the court below that within a week after the fire McIntosh went to the office of the agent of the insurance company and tendered him legal currency in an amount equal to the premium due on the policy and that the agent refused to accept it. If the tender had been made under the authorization of the corporation of Kline Bros. & Co., it would have amounted to a ratification of the contract in case Kline Bros. & Co., had the right to ratify after the loss. But an officer who makes an unauthorized contract has no more right to ratify it than he has to make it. The party to ratify the contract is the party who had authority to make it. *Western National Bank vs. Armstrong*, 152 U. S. 346, 14 Sup. Ct. 572, 38 L. Ed. 470; *Norton vs. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; *Marsh vs. Fulton County*, 10 Wall. 676, 19 L. Ed. 1040; *Hotchen vs. Kent*, 8 Mich. 526; *Bishop on Contracts*, § 848. As there is nothing in the record which shows that McIntosh ever was authorized to make the contract, so the record equally fails to disclose that after the contract was made he was ever authorized to ratify it. An agent cannot bind his principal by an unauthorized ratification. *Fay vs. Slaughter*, 194 Ill. 157, 62 N. E. 592, 56 L. R. A. 564, 88 Am. St. Rep. 148; *Britt vs. Gordon*, 132 Iowa, 431, 108 N. W. 319, 11 Ann. Cas. 407; *Deffenbaugh vs. Jackson Paper Mfg. Co.*, 120 Mich. 242, 79 N. W. 197; *Driscoll vs. Modern Brotherhood of America*, 77 Neb. 282, 109 N. W. 158.

[5] Ratification proceeds upon the theory that there was no

previous authority. It follows therefore that, if the original authorization of the contract was required to be in a particular mode, the authority to ratify must be conferred in like manner. Wherever the law requires a particular mode of authorization, there can be no valid ratification except in the same manner. *Borel vs. Rollins*, 30 Cal. 408; *McCraken vs. San Francisco*, 16 Cal. 591; *Despatch Line of Packets vs. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Morris vs. Ewing*, 8 N. D. 99, 76 N. W. 1047; 31 Cyc. 1261. The power to make "all contracts or obligations of any kind" was in the board of directors acting jointly. And "the directors by the consent of each and all of the members of the board may, in writing to be filed with the records and minutes of the company, agree to and transact any business specified in such writing, without the actual holding of a meeting for such purpose; but, in all such instances, the said writing shall be preserved and kept by the secretary of the board." The board of directors never authorized, so far as the record discloses, *McIntosh* to make the tender. Neither did they proceed to authorize him to do so under the clause which provided that they might act under conditions specified without holding a meeting.

[6] On April 5th, Goldstein & Co., assuming to act as adjusters for Kline Bros & Co., notified the insurance company of the loss. This too cannot be accepted as a ratification of the contract by Kline Bros & Co., for there is nothing in the record which shows that Goldstein & Co. were ever authorized by Kline Bros. & Co. to do what they did.

To this letter of Goldstein & Co., the insurance company replied that the letter would be forwarded to its manager for the Southern States at Atlanta, Ga., "who will look after the adjustment." This cannot be regarded as a recognition of the policy for at the time it was written the insurance company had no knowledge of the facts which affected its validity. There can be no ratification where there is not full knowledge of all the material facts. *Schutz vs. Jordan*, 141 U. S. 213, 11 Sup. Ct. 906, 35 L. Ed. 705; *Weber vs. Bridgman*, 113 N. Y. 600, 21 N. E. 985; *Foote vs. Cotting*, 195 Mass. 55, 80 N. E. 55, 15 L. R. A. (N. S.) 693; *Sill vs. Pate*, 230 Ill. 39, 82 N. E. 356; *Goodwin vs. East Hartford*, 70 Conn. 18, 38 Atl. 876; *Daley vs. Iselin*, 218 Pa. 515, 67 Atl. 837; *Belcher vs. Manchester Building*, etc., Ass'n, 74 N. J. Law, 833, 67 Atl. 399.

[7] Then followed on April 27, 1909, a letter addressed to Kline Bros. & Co., written by the manager of the insurance company, notifying the former:—

"That we have just learned after diligent inquiry that the above numbered policy * * * which you hold was void from its incipiency. Said policy is not, and never was, a contract of this company, and we further notify you that this company hereby specifically denies any liability whatever under said policy."

This amounted to a final repudiation of the contract by the insurance company and prior to that there is nothing in the record which can be accepted as proof of a ratification by Kline Bros. & Co., of the unauthorized action of McIntosh in taking out the policy on March 16, 1909, even if we assume that his action was capable of ratification after the loss.

According to some of the authorities, in order to sustain the action on this policy, it would be necessary to show not only that there was ratification of the policy by Kline Bros. & Co., but also ratification by the insurance company. The theory being that inasmuch as the obligations of a contract must be mutual, if when the policy was issued Kline Bros. & Co. was not bound, the insurance company was not bound. In Mechen on Agency, § 179, that writer says:—

"The principle, however, as has been seen, may by his subsequent affirmation become bound by the contract, but it is obvious that, unless the other party has expressly agreed to that effect, it cannot rest with the principal alone to bind the other party also to the contract. That can be done only by some act on the part of the other party signifying his present consent to be bound."

Upon this proposition the authorities are conflicting, and we do not find it necessary at this time to say whether we regard as correct the rule stated by this author. It is enough for the purposes of this case for us to say that there is no doubt that, until ratification had taken place, the insurance company was free to withdraw from the contract and that it did so withdraw by the notification given on April 27th, which was prior to any valid ratification by Kline Bros. & Co.

In the second case, the title of which stands at the head of this opinion, the essential facts are the same as in the first case considered except that the amount of the policy in question is in the latter case \$4,000.

The judgment in each of the cases is affirmed, with costs.

SUPREME COURT OF RHODE ISLAND.**RIDDELL****vs.****ROCHESTER-GERMAN INS. CO. OF NEW YORK.***

On motion for rehearing. Denied.
For former opinion, see 89 Atl. 833.

PER CURIAM.

This is a motion by the defendant for a rehearing of said cause on the seventh exception, on the ground that some of the questions considered by the court in its opinion were not fully argued at the original hearing, and because it believes that the court, upon a fuller consideration, would reach a conclusion different from that expressed in the opinion.

It is true that some of the questions considered were not very fully argued at the original hearing. The argument now submitted in support of the motion is based upon the opinions in certain cited cases. It is sufficient to say that in the preparation of the opinion in this case all of the questions discussed in the motion were carefully considered, and that in so doing all of the cases cited in the motion, as well as many others, were examined. All except two of the cases cited in the motion are cited in the opinion. Upon consideration thereof the argument accompanying the motion does not, in our view, present any sufficient reason for changing the conclusions arrived at in the opinion.

As to the matters of pleading and proof, it seems sufficient for present purposes to suggest that the citation from *Crady vs. Home Fire & Marine Ins. Co.*, 27 R. I. 435, 63 Atl. 173, 4 L. R. A. (N. S.) 288, to the effect that "it is incumbent upon the plaintiff to allege and prove such award," refers to a plaintiff as owner, and not as mortgagee. The opinion in this case clearly implies that the rule as to the latter is not the same. And when a mortgagee is plaintiff, it might be true that the proper allegations and proof in a case would vary somewhat, according to whether the court definitely adopts the view held in *Reed vs. Firemen's Ins. Co.*, 76 N. J. Law, 11, 69 Atl. 724, and 81 N. J. Law, 523, 80 Atl. 462, 35 L. R. A. (N. S.) 343, that a mortgagee is not required to furnish proofs of loss as a condition precedent to his right of action on the policy, and that a failure of the mortgagor and owner to furnish such proofs constitutes one of the neglects from the invalidating consequences of which the mortgagee is exempted, or the view that while there is no express obli-

* Decision rendered, April 15, 1914. 90 Atl. Rep. 170.

gation upon the mortgagee to make proofs of loss yet by implication under certain conditions it might devolve upon him to do so in some form, as held in *Union Institution for Savings vs. Phoenix Ins. Co.*, 196 Mass. 230, 81 N. E. 994, 14 L. R. A. (N. S.) 459, 13 Ann. Cas. 433; the court in this case having held that upon the facts as they appear "in either view the mortgagee would be protected by the mortgage clause attached to the policy and by its terms have a right of recovery."

The motion for a rehearing is denied.



**SOUTHWESTERN SURETY INS. CO. OF OKLAHOMA vs.
CLAY & MOWLIN.***

(Supreme Court of Arkansas.)

**1. INSURANCE — FIRE INSURANCE — ACTION AGAINST
SURETY.**

Drafts for the amount of a loss by fire were not paid upon presentation, but went to protest, thereupon the insured brought an action against the surety on the bond of the insurance company. The complaint set out the policy and the bond, together with a statement of the loss by fire, the adjustment and the nonpayment of the drafts, and prayed for a recovery of the amount of the draft and protest fees, and also for the penalty and the reasonable attorney's fee provided for by the insurance laws. *Held*, that the action was one on the draft, and not the policy, as shown by the prayer for recovery of the protest fees which would otherwise not be recoverable; and hence there can be no recovery of the penalty and attorney's fees.

(For other cases, see Insurance, Cent. Dig. § 7; Dec. Dig. § 8.)

**2. PAYMENT—FIRE POLICY—RECOVERY ON BOND—RESCIS-
SION OF PAYMENT.**

Where a draft drawn on an insurance company for the amount of a loss covered by its policy was not paid, there can be no recovery on the policy against the surety who guaranteed payment, unless the draft is surrendered; but recovery must be had on the draft alone.

(For other cases, see Payment, Cent. Dig. § 141; Dec. Dig. § 53.)

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Action by Clay & Nowlin against the Southwestern Surety Insurance Company of Oklahoma. From a judgment for plaintiffs, defendant appeals. Reversed, and action dismissed.

J. W. & J. W. House, Jr., of Little Rock, for Appellant.

J. W. Blackwood, of Little Rock, for Appellees.

* Decision rendered, March 30, 1914. 165 S. W. Rep. 644.

FARMERS' MUT. EQUITY INS. SOCIETY *vs.* SMITH.*

(Court of Appeals of Kentucky.)

1. INSURANCE—CONSTRUCTION—CONSTRUING AGAINST INSURER.

The language of exceptions, warranties, and conditions in insurance policies must be clear and unambiguous, and any doubt in the meaning thereof will be resolved against the insurer, who selected the language used.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

2. INSURANCE—CONSTRUCTION—VACANCY OF PREMISES.

The effect of a provision of an insurance policy, avoiding it if the premises become vacant or unoccupied, depends upon the intention of the parties, to be ascertained from the whole instrument, the subject-matter of the contract, and the situation of the property insured.

(For other cases, see Insurance, Cent. Dig. §§ 764-779; Dec. Dig. § 323.)

3. INSURANCE—CONSTRUCTION—VACANCY OF PREMISES.

Under an insurance policy for five years on a dwelling house, which provided that insurance would not be carried on unoccupied buildings unless covered by a vacancy permit, where a tenant moved out on Saturday evening and another tenant was to take possession on the following Monday, the insurer was liable for the destruction of the house by fire early Monday morning, since, where property is occupied by a tenant, it must necessarily be within the contemplation of the parties that occasionally it will be vacant for a short and reasonable interval between the outgoing of one tenant and the incoming of another.

(For other cases, see Insurance Cent. Dig. §§ 764-779; Dec. Dig. § 323.)

Appeal from Circuit Court, Henderson County.

Action by Herbert Smith against the Farmers' Mutual Equity Insurance Society. Judgment for plaintiff, and defendant appeals. Affirmed.

Montgomery Merritt, of Henderson, for Appellant.
Vance & Heilbronner, of Henderson, for Appellee.

* Decision rendered, April 21, 1914. 165 S. W. Rep. 675.

LIVERPOOL & LONDON & GLOBE INS. CO. *vs.* WRIGHT

ET AL.*

(Court of Appeals of Kentucky.)

1. APPEAL AND ERROR—PRESENTATION BELOW.

Statements of counsel in argument which were objected to, but not called to the court's attention or acted on by it, are not ground of reversal.

(For other cases, see Appeal and Error, Cent. Dig. §§ 1417-1425; Dec. Dig. § 242.)

2. NEW TRIAL—GROUNDS—IMPROPER ARGUMENT.

While ordinarily a reprimand of counsel for making a statement in argument, not supported by the evidence, accompanied by an instruction to disregard the statement is sufficient, if the statement is of such a prejudicial nature that it may improperly influence the jury notwithstanding the reprimand, the court should set aside a verdict obtained by the offending counsel.

(For other cases, see New Trial, Cent. Dig. §§ 43, 44; Dec. Dig. § 29.)

3. APPEAL AND ERROR—PREJUDICIAL ERROR—ARGUMENT OF COUNSEL.

In an action on a fire policy, in which it appeared that E., a witness for defendants, had attacked plaintiff's counsel outside of the courthouse for remarks made to witness during the trial, and inflicted bruises on him, plaintiff's counsel stated in argument, pointing to the bruises on his face: "You see these scars. Suppose I had been your lawyer and E. had demanded an apology and I had refused to make it. A man may be stronger and younger than me, but when I get to be such a coward as not to represent my client, I will leave the courthouse. I cannot be bullied by cutthroats, they may beat me, but they cannot scare me. I want to defy the contemptible cutthroat that undertakes to defy me in my duty to my client." At the conclusion of the argument the judge sustained an objection to such statement and warned the jury that the statement was not proper argument and should not be considered in reaching a verdict. *Held* that the improper remark was sufficiently prejudicial to require a reversal notwithstanding such admonition.

(For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060.)

4. APPEAL AND ERROR — VERDICT — INSUFFICIENCY OF EVIDENCE.

The appellate court is only authorized to grant a new trial for insufficiency of evidence, where the verdict is palpably or flagrantly against the evidence.

(For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.)

5. TRIAL — CREDIBILITY OF WITNESSES—QUESTION FOR JURY.

The question of the credibility of witnesses is for the jury in the trial court.

(For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.)

* Decision rendered, March 27, 1914. 164 S. W. Rep. 952.

6. INSURANCE—FIRE INSURANCE—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence in an action on a fire policy covering tobacco stored, *held* to sustain a finding that insured did not burn the warehouse.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

7. EVIDENCE—HEARSAY.

In an action on a fire policy, evidence that before the fire a certain person told witness that plaintiff's barn and a certain house were going to burn that night, which statement was not made in plaintiff's presence, was properly excluded as hearsay not connecting plaintiff with the fire.

(For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.)

8. WITNESSES—IMPEACHMENT.

In an action on a fire policy, in which it was claimed that plaintiff burned his own property, a witness was asked if she had testified on the former trial that she had heard a conversation between plaintiff and another, in which plaintiff said he was losing money and had to sell out to the insurance companies, but that that was graveyard talk, and replied that another procured her to testify to that, when defendants offered to prove that witness had stated on the former trial that she had heard such conversation, which evidence was excluded. Civ. Code Prac. § 596, provides that a party producing a witness is not allowed to impeach his credit by evidence of bad character, unless it was indispensable that the party should produce him; but he may contradict him by other evidence, and by showing that he had made statements different from his present testimony. *Held* that where a party's witness states that certain facts sought to be proved did not transpire, he cannot introduce other witnesses to prove that the witness told them that such facts did transpire; so that the evidence offered by defendants was properly excluded.

(For other cases, see Witnesses, Cent. Dig. §§ 1094, 1099, 1100; Dec. Dig. § 321.)

9. NEW TRIAL—GROUNDS—SURPRISE.

In order to claim a new trial on the grounds of surprise the party must ask that the swearing of the jury be set aside and trial be postponed, and cannot take chances on a verdict in his favor, and afterwards claim a new trial for surprise.

(For other cases, see New Trial, Cent. Dig. §§ 195-198; Dec. Dig. § 97.)

10. NEW TRIAL—GROUNDS—SURPRISE—EVIDENCE.

Evidence taken on motion for a new trial in an action on a fire policy *held* to justify an inference that a certain witness who changed her testimony on a second trial was tampered with.

(For other cases, see New Trial, Cent. Dig. §§ 303-305; Dec. Dig. § 147.)

11. NEW TRIAL—GROUNDS—SURPRISE.

If a witness was in fact tampered with, so as to induce her to change her testimony, the fact that the successful party had no part in affecting the witness' testimony will not prevent the granting of a new trial on that ground.

(For other cases, see New Trial, Cent. Dig. § 188; Dec. Dig. § 94.)

12. NEW TRIAL—GROUNDS—SURPRISE.

A witness who had testified on a former trial in an action on a fire policy

that she had heard a conversation between plaintiff and another in which plaintiff said he was losing money and had to sell out to the insurance companies, testified on the present trial that another procured her to testify falsely on the former trial, but there was evidence to justify the conclusion that witness had been tampered with since the former trial and induced to change her testimony. *Held* that the surprise to defendants by the change in witness' testimony together with the circumstances tending to show that she was tampered with were grounds for a new trial.

(For other cases, see New Trial, Cent. Dig. §§ 181-183; Dec. Dig. § 90.)

Appeal from Circuit Court, Graves County.

Actions by B. W. Wright and another against the Liverpool & London & Globe Insurance Company; by the same against the Old Colony Insurance Company; by the same against the Citizens' Fire Insurance Company; and by the same against the People's National Fire Insurance Company. Judgment for plaintiffs in each case and defendants appeal. Reversed, and remanded for a new trial.

Bunk Gardner and M. B. Holifield, both of Mayfield, for Appellants. W. J. Webb, B. C. Seay, Robbins & Thomas, and Moorman & Warren, all of Mayfield, for Appellees.



MACATAWA TRANSP. CO. vs. FIREMEN'S FUND INS. CO.*

(Supreme Court of Michigan.)

1. APPEAL AND ERROR—SUBSEQUENT APPEAL—THEORY OF CASE.

In an action, on a fire policy covering a gasoline launch which was burned where the special notice attached to defendant's plea advised that it would show as a defense that the written application represented that the launch would not be laid up within 500 feet of any exposing building, but that in fact it was laid up within that distance, and where a judgment for plaintiff was reversed, and it was held that the principal issue of fact for retrial was whether any of the buildings within 500 feet were exposing buildings within the policy, plaintiff, on a retrial, was allowed to introduce evidence that it had not been represented in the application that no exposing buildings were within 500 feet of the place where the launch was laid up. *Held*, that plaintiff had not adopted an inconsistent theory or raised a new issue in violation of the rule that plaintiff, on a retrial, cannot take a position wholly inconsistent with his claims on a former trial.

(For other cases, see Appeal and Error, Cent. Dig. § 4715; Dec. Dig. § 1214.)

2. INSURANCE — DECLARATION — PERFORMANCE OF CONDITIONS.

A declaration on an insurance policy is good if it alleges performance of conditions precedent, and it need not aver performance of con-

* Decision rendered, March 27, 1914. 146 N. W. Rep. 396.

ditions subsequent, nor negative matters of defense, but may meet them as they arise on the trial; and, in view of circuit court rules 3 (c), 7 (d), plaintiff may attack an application which is a part of a policy on the validity of which he relies for recovery.

(For other cases, see Insurance, Cent. Dig. §§ 1554, 1632-1644; Dec. Dig. § 645.)

3. INSURANCE—ACTION ON POLICY—QUESTION FOR JURY—AUTHORITY TO MAKE APPLICATION.

On evidence in an action on a policy covering a gasoline launch which was practically destroyed by fire, *held*, that the question as to the authority of the master of the boat to make the application, and whether he made answers to defendant's agent as written in the survey, were for the jury.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

4. INSURANCE—MARINE INSURANCE—“SURVEY.”

The term “survey,” as used in marine insurance, in its direct significance, as well as in the broader meaning which it may be supposed to have as applied to the subject-matter, imports only a plan and description of the present existing state, condition, and mode of use of the property, so that, so far as the representations therein are of an executory nature, or relate to the use or occupation of the premises subsequent to the policy, the owner is not bound by them.

(For other cases see Insurance, Cent. Dig. §§ 327-335; Dec. Dig. § 159.)

(For other definitions, see Words and Phrases, vol. 8, pp. 6823-6825; vol. 8, p. 7811.)

5. INSURANCE—AGENCY FOR INSURER.

When a general insurance agent, to whom application for insurance was made, obtained it from defendant through its agent, he became agent of the insurer in the transaction.

(For other cases, see Insurance, Cent. Dig. §§ 99, 100; Dec. Dig. § 73.)

Error to Circuit Court, Ottawa County; Orien S. Cross, Judge.

Action by the Macatawa Transportation Company against the Firemen's Fund Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before McAlvay, C. J., and Moore, Brooke, Kuhn, Stone, Ostrander, Bird, and Steere, JJ.

Gore & Harvey, of Benton Harbor, for Appellant.
Diekema, Kollen & Ten Cate, of Holland, for Appellee.

PEOPLE vs. AMERICAN CENT. INS. CO.*

(Supreme Court of Michigan.)

1. TAXATION—ASSESSMENT—INSURANCE CORPORATIONS—“REINSURANCE.”

Pub. Acts 1903, No. 164, provides that any foreign fire insurance company shall, as a condition of doing business in the state, pay a specific tax of 3 per cent of the gross amount of all premiums received in the state, but that the return premiums on canceled policies shall be deducted, provided that all companies transacting any reinsurance business in any manner shall pay the tax upon the original premium received by the reinsured company on that portion of the risk reinsured, provided the reinsuring company may deduct from such premiums that portion of such premiums upon which the reinsured company has paid the tax. A foreign insurance company reinsured risks written by a local fire company. The local insurers paid only an ad valorem tax. *Held*, that the foreign insurance company was not liable for the 3 per cent tax upon the original premium received by the local reinsured company on that portion of the risk reinsured; the expression “reinsurance” meaning either the substitution, with the consent of the insured, of a second insurer for the first, so that the original insurer is released, or the agreement of one insurer to indemnify a prior insurer on account of part of a risk written by the latter.

(For other cases, see Taxation, Cent. Dig. § 248; Dec. Dig. § 140.)

(For other definitions, see Words and Phrases, vol. 7, pp. 6052, 6053; vol. 8, p. 7783.)

2. STATUTES—CONSTRUCTION—“PROVISO.”

While the office of a proviso is usually to explain, modify, and qualify the enacting clause of a statute, yet, when clearly designed to do so, it may be construed to enlarge the scope of the statute.

(For other cases, see Statutes, Cent. Dig. § 310; Dec. Dig. § 228.)

(For other definitions, see Words and Phrases, vol. 6, pp. 5755-5757.)

Error to Circuit Court, Ingham County; Howard Wiest, Judge. Action by the People of the State of Michigan against the American Central Insurance Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Argued before McAlvay, C. J., and Brooke, Kuhn, Stone, Ostrander, Bird, Moore, and Steere, JJ.

Grant Fellows, Atty.-Gen., S. D. Pepper, Asst. Atty.-Gen., for the People.

Arthur P. Hicks, of Detroit, for Appellee.

* Decision rendered, March 26, 1914. 146 N. W. Rep. 235.

CITY OF AURORA *vs.* FIREMEN'S FUND INS. CO.*

(Springfield Court of Appeals. Missouri.)

1. EVIDENCE—EXPERT WITNESSES—QUALIFICATIONS.

A practical mason of twenty years' experience, who had built brick walls, and had examined the brick building in question after it was burned, was qualified to testify as an expert as to the strength of the walls after the fire.

(For other cases, see Evidence, Cent. Dig. §§ 2343, 2344, 2347; Dec. Dig. § 536.)

2. APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in admitting evidence by a witness, who had testified in an action on a fire policy as to the practicability of building onto the walls of the burnt building, that he did not pay much attention to the lower floor, but it looked to him as though it was in bad shape, on the ground that it was a conclusion, was not reversible; he having testified on cross-examination that he did not think there was any fire on the lower floor.

(For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.)

3. EVIDENCE—OPINION EVIDENCE—EXPERT OPINION.

In an action on a fire policy covering a brick building, in which the issue was whether the building was totally destroyed, whether it would be safe to build onto the walls left standing was a question for expert testimony.

(For other cases, see Evidence, Cent. Dig. §§ 2317, 2318; Dec. Dig. § 513.)

4. EVIDENCE—EXPERT TESTIMONY.

The test whether a question is the subject of expert testimony is not the technical nature of the subject-matter, but whether the witness' skill and experience, whether technical or common, will aid the jury in determining the question.

(For other cases, see Evidence, Cent. Dig. § 2308; Dec. Dig. § 505.)

5. EVIDENCE—EXPERT TESTIMONY—NECESSITY OF HYPOTHETICAL QUESTIONS.

If expert witnesses have made personal observations as to the subject-matter of the question, the facts need not be presented hypothetically.

(For other cases, see Evidence, Cent. Dig. § 2368; Dec. Dig. § 552.)

6. INSURANCE—FIRE INSURANCE—“TOTAL LOSS.”

In determining whether there is a “total loss” from a fire, the question is whether the building is so far destroyed that the ruins are worthless and cannot be used in reconstructing it, so that when rebuilt it will be in as good condition as before the fire.

(For other cases, see Insurance, Cent. Dig. §§ 1266-1268; Dec. Dig. § 493.)

(For other definitions, see Words and Phrases, vol. 8, pp. 7012, 7013.)

* Decision rendered, March 28, 1914, 165 S. W. Rep. 357.

7. INSURANCE—FIRE INSURANCE—ACTIONS—JURY QUESTION.

In an action on a fire policy covering a brick building, evidence held to make it a jury question whether the building was a total loss.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

8. TRIAL—RECEPTION OF EVIDENCE—SCOPE OF REBUTTAL.

Where, in an action on a fire policy, defendant introduced evidence that certain cracks in the walls of the building were caused by the settling of the building from age, and not by the fire, plaintiff could show in rebuttal, by witnesses who had examined the walls before and after the fire, that there were more cracks therein after than before the fire.

(For other cases, see Trial, Cent. Dig. §§ 148-150; Dec. Dig. § 62.)

9. INSURANCE — FIRE INSURANCE — AMOUNT OF RECOVERY—PENALTIES.

In view of Acts 1911, pp. 282, 283, permitting an amount to be added for vexatious refusal to pay a fire policy, "not to exceed" 10 per cent "of the loss," it was error to permit an allowance fixed at "10 per cent on the amount of said policy."

(For other cases, see Insurance, Cent. Dig. § 1498; Dec. Dig. § 602.)

10. APPEAL AND ERROR--HARMLESS ERROR—AMOUNT OF RECOVERY.

Error in an action on a fire policy in permitting the jury to allow plaintiff an attorney's fee, not to exceed 10 per cent of the amount of the policy, in case of vexatious refusal to pay the amount of the policy, when Acts 1911, pp. 282, 283, only authorize an allowance of a "reasonable attorney's fee," is not reversible, since more than 10 per cent might be allowed if it were reasonable.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.)

11. TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE—ALLOWANCE OF ATTORNEY'S FEE.

Where, in an action on a fire policy, there was no evidence as to the value of the services of plaintiff's attorney, it was error to permit the allowance of an attorney's fee to plaintiff for vexatious refusal to pay the amount of the loss.

(For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.)

12. INSURANCE—FIRE INSURANCE—VALUE OF PROPERTY—ESTOPPEL TO DENY.

Where the property destroyed was insured for \$7,500, and there was no evidence showing a depreciation in its value between the date of the policy and the fire, the company would be estopped to deny that the value of the property was \$7,500.

(For other cases, see Insurance, Cent. Dig. §§ 1275, 1276; Dec. Dig. § 500.)

13. APPEAL AND ERROR—HARMLESS ERROR.

Where, in an action on a fire policy, the jury found for plaintiff, and under the instructions must have found for the full amount of the policy, and the verdict did not add to such amount any sum for interest or as a penalty or attorney's fee for vexatious refusal to pay the loss, error in instructions as to the amount of the penalty

and in permitting an attorney's fee to be allowed was not prejudicial to defendant.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.)

Appeal from Circuit Court, Lawrence County; Carr McNatt, Judge. Action by the city of Aurora against the Firemen's Fund Insurance Company. From a judgment for plaintiff defendant appeals. Affirmed.

I. V. McPherson, of Aurora, and Fyke & Snider, of Kansas City, for Appellant.

E. J. McNatt and H. H. Bloss, both of Aurora, for Respondent.



WILLSON (CUSTER NAT. BANK SUBSTITUTED PLAINTIFF)

vs. GERMAN-AMERICAN INS. CO. (No. 17,640.)*

(Supreme Court of Nebraska.)

1. INSURANCE—PLEADING AND PROOF—VARIANCE.

In an action against an insurance company to recover for loss by fire, the petition alleged that the contract was that the insurance should be in full force from noon of a certain day. The evidence was that it was agreed that the insurance should be in force from the time of the agreement, which was between 8 and 9 o'clock of the forenoon of the said day. The loss by fire was several days later. *Held*, that the supposed variance between the allegations and proof was immaterial.

(For other cases, see Insurance, Cent. Dig. §§ 1554, 1632-1644; Dec. Dig. § 654.)

**2. INSURANCE—RENEWAL OF POLICY—ORAL AGREEMENT
—SUFFICIENCY OF EVIDENCE.**

The parties to a contract of fire insurance may agree orally to renew such contract on the same terms for another year. The evidence in this case stated in the opinion is *held* to support the finding of the jury that the defendant's agent so contracted with the plaintiff, and that the agent acted within his ostensible authority in making such contract.

(For other cases, see Insurance, Cent. Dig. §§ 276-291, 1555, 1707-1728; Dec. Dig. §§ 145, 665.)

**3. INSURANCE—RENEWAL OF POLICY—AUTHORITY OF
AGENT—ESTOPPEL.**

If the local agent of a fire insurance company has by agreement renewed a policy of insurance from year to year, and such agreement has been acted upon by the company, the fact that the insured knew that the agent had no authority to waive the written condi-

* Decision rendered, April 3, 1914. 146 N. W. Rep. 945. Syllabus by the Court.

tions of the policy will not estop him to assert that the agent was authorized to so renew the policy.

(For other cases, see Insurance, Cent. Dig. §§ 75, 253-262; Dec. Dig. § 141.)

Appeal from District Court, Custer County; Hostetler, Judge.

Action by Fred C. Willson (Custer National Bank, substituted plaintiff) against the German-American Insurance Company. From judgment for plaintiff, defendant appeals. Affirmed.

Burr, Greene & Greene, of Lincoln, for Appellant.
Sullivan & Squires, of Broken Bow, for Appellee.

FIRE ASS'N OF PHILADELPHIA *vs.* SCHELLENGER.*

(Court of Chancery of New Jersey.)

1. INSURANCE—SUBROGATION OF INSURER.

An insurance against loss by fire is an indemnity which the assured holds, and, when the insurance company pays the insured the amount for which it was liable, the insurer becomes subrogated to any rights of the insured as against a third person to the amount of the payment.

(For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.)

2. INSURANCE—SUBROGATION OF INSURER ON PAYMENT OF LOSS.

An insured sustained a loss by fire which was only partially covered by insurance. He collected the amount of the policy, and sued a railroad and recovered a judgment for \$6,000, which was compromised for \$3,000. Held, that the insured held the \$3,000 in trust for the insurance company, to the extent of the amount of the policy paid, as the insurance company became the equitable assignee of the right of action against the railroad, the legal title remaining in the insured, and the insured could not compromise without the consent of the company.

(For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.)

3. INSURANCE—SUBROGATION OF INSURER.

An insurance company after paying a fire loss has a right of subrogation, regardless of whether there is a subrogation clause in the policy, because the insurance is an indemnity, and the primary liability is upon the one who wrongfully occasions the loss.

(For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.)

Action by the Fire Association of Philadelphia against Robert V. Schellenger. Decree for complainant.

French & Richards, of Camden, for Complainant.
William C. French, of Camden, for Defendant.

* Decision rendered, April 4, 1914. 90 Atl. Rep. 240.

FIRE ASS'N OF PHILADELPHIA *vs.* WELLS.*

(Court of Chancery of New Jersey.)

1. INSURANCE—PAYMENT OF LOSS—RIGHT TO SUBROGATION.

Where an insurer pays for loss by fire occasioned by the negligence of a railroad company, it becomes entitled to subrogation against the railroad company by operation of law, and a subrogation receipt or other agreement is unnecessary.

(For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.)

2. INSURANCE—PAYMENT OF LOSS—SUBROGATION—EFFECT OF SETTLEMENT.

Defendant's property, which was insured by complainant, was fired by the negligence of a railroad company. After complainant made payment to the amount of the policy and received a written receipt declaring that it should be subrogated to that amount, defendant settled with the railroad company, executing it a release of all claims. *Held*, that as defendant settled the claim without complainant's knowledge, and did not notify it of the giving of a release which was a *prima facie* bar, complainant is entitled to hold defendant as trustee for the amount of the loss which it paid.

(For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.)

Bill by the Fire Association of Philadelphia against Thomas Wells. Decree for complainant.

Defendant was the owner of certain buildings and their contents, which have been totally destroyed by fire caused by the negligence of a railroad company. The buildings were protected by fire insurance written by complainant company to the amount of \$2,000. After the fire complainant company paid the \$2,000 insurance to defendant, and received from defendant a receipt for the money, in which receipt defendant formally assigned to complainant his claim against the railroad company to that amount. Thereafter defendant, without the knowledge of complainant, made a settlement with the railroad company, whereby he received from that company \$5,000 and executed a general release, discharging the railroad company from all liability by reason of the fire.

Complainant now seeks to recover from defendant its loss of \$2,000.

By way of defense defendant claims that, when he accepted the insurance money and executed the subrogation receipt in behalf of complainant, he was informed by the agent who paid him the money that he would be privileged to settle with the railroad company for the balance of his loss, and also claims that in making his settlement with the railroad company he settled for only the balance of his loss, and at that time apprised the railroad company of the fact that he had received the \$2,000 insurance money, and had executed a subrogation receipt to complainant insurance company for that amount.

Thompson & Smathers, of Atlantic City, for Complainant.
Westcott & Weaver, of Camden, for Defendant.

* Decision rendered, March 26, 1914. 90 Atl. Rep. 244.

JOHNSON *vs.* STEWART ET AL.*

(Supreme Court of Pennsylvania.)

1. WAREHOUSEMEN—BAILOR AND BAILEE—CREATION OF RELATION.

Where warehousemen accepted malt from the owner thereof and stored same, they became his bailees, though not aware that he was the real owner.

(For other cases, see Warehousemen, Cent. Dig. §§ 11-14; Dec. Dig. § 10.)

2. INSURANCE—PROPERTY COVERED—INTEREST OF BAILOR

A bailor of grain products, stored with a warehouseman, cannot recover under a fire insurance policy procured by the warehouseman, unless it appears that he intended in taking out the policy to cover the bailor's interest.

(For other cases, see Insurance, Cent. Dig. §§ 316-322; Dec. Dig. § 156.)

3. INSURANCE—INSURABLE INTEREST—WAREHOUSEMAN.

A grain warehouseman may procure a valid insurance policy covering merchandise which may be subsequently stored with him.

(For other cases, see Insurance, Cent. Dig. §§ 139-157, 177; Dec. Dig. § 115.)

4. INSURANCE — RIGHTS OF BAILOR — GOODS STORED IN WAREHOUSE.

The bailor of goods destroyed by fire while stored in a warehouse may adopt the benefit of insurance previously effected by the warehouseman if he notify the latter before proof of loss is made.

(For other cases, see Insurance, Cent. Dig. §§ 316-322; Dec. Dig. § 156.)

5. EVIDENCE—PAROL—INSURANCE POLICY.

On a bill by a bailor to compel an accounting by warehousemen for the proceeds of insurance covering goods stored with them, parol evidence was inadmissible to explain or vary the insurance policy by showing whether the parties to the insurance contract intended that it should cover plaintiff's goods.

(For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.)

6. INSURANCE—POLICY—CONSTRUCTION — PROPERTY COVERED.

An insurance policy issued to a grain warehouseman, securing him against loss by fire on merchandise incidental to his business, and consisting chiefly of "grain products * * * their own or held in trust * * * or consignment * * * while contained in * * * elevator," will cover malt not then in the warehouse, but subsequently shipped thereto, though the shippers have made no arrangements with the warehouseman relative to insurance.

(For other cases, see Insurance, Cent. Dig. §§ 338, 352; Dec. Dig. § 162.)

Appeal from Court of Common Pleas, Allegheny County.
Bill in equity for discovery and for an accounting, by Willis S. John-

* Decision rendered, Jan. 5, 1914. 90 Atl. Rep. 349.

son, trading as Joseph S. Finch & Co., against David G. Stewart and another, etc. From decree for plaintiff, defendants appeal. Affirmed.

Thomas Patterson, and F. R. Stoner, both of Pittsburgh, for Appellants.

Donald Thompson, and Blakeley & Calvert, all of Pittsburgh, for Appellee.

RAWLS vs. AMERICAN CENTRAL INS. CO. (No. 8,805.)*

(Supreme Court of South Carolina.)

1. INSURANCE—FORFEITURE CLAUSE—MORTGAGE OF PERSONALTY.

Within the clause of a fire policy providing for a forfeiture, "if the subject of insurance be personal property, and becomes incumbered by a chattel mortgage," there is no forfeiture because of a mortgage on land, "with all improvements thereon situate," if the insured property on the land is a fixture.

(For other cases, see Insurance, Cent. Dig. §§ 829-839; Dec. Dig. § 330.)

2. FIXTURES—QUESTION OF FACT.

Unless the facts are susceptible of but one inference, there is a question of fact as to whether a structure on land is a fixture.

(For other cases, see Fixtures, Cent. Dig. §§ 67-79; Dec. Dig. § 35.)

3. MORTGAGES—ASSIGNMENT—INTERESTS ASSIGNED.

The assignment, "For value received, I hereby transfer all my rights and title to the within note and mortgage, * * * without recourse," is sufficient in form to transfer the assignor's interest as mortgagee in the insurance on the mortgaged property.

(For other cases, see Mortgages, Cent. Dig. §§ 629-632; Dec. Dig. § 243.)

4. EVIDENCE—PAROL EVIDENCE—CONSIDERATION.

The consideration in an assignment being stated to be "value received," parol evidence is admissible to show the true consideration.

(For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.)

5. INSURANCE—SUBROGATION.

A mortgagee's interest being insured, the insurer on paying his claim is entitled to subrogation to the mortgagee's rights under the mortgage.

(For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.)

6. MORTGAGES—CANCELLATION—RIGHTS AND LIABILITIES OF MORTGAGEE.

The insurer having canceled the insurance and returned the premium to the owner of the property, without notice to the mortgagee, whose interest was insured, the mortgagee, recovering of the insurer on a loss occurring, is not required to return to the insurer the premium which it returned to the property owner.

(For other cases, see Mortgages, Cent. Dig. §§ 563-567; Dec. Dig. § 208.)

* Decision rendered, April 21, 1914. 81 S. E. Rep. 505.

7. INTEREST — COMPLAINT — PRAYER LIMITING RECOVERY.
 The complaint merely alleging damage in the sum of \$1,000, and praying judgment for that sum, plaintiff cannot recover interest from the time the claim became payable, and so make the recovery more than \$1,000.

(For other cases, see Interest, Cent. Dig. § 147; Dec. Dig. § 66.)
 Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Aiken County; Geo. W. Gage, Judge.

Action by W. L. Rawls against the American Central Insurance Company. Judgment for plaintiff and defendant appeals. Affirmed conditionally.

See, also, 94 S. C. 299, 77 S. E. 1013, 45 L. R. A. (N. S.) 463.

Davis & Croft, and Gunter & Gyles, of Aiken, for Appellant.
 Hendersons, of Aiken, for Respondent.



**HENDERSON vs. ABBEVILLE GREENWOOD MUT.
 INS. ASS'N***

(Supreme Court of South Carolina.)

1. INSURANCE—FIRE INSURANCE—CONSTRUCTION OF CONTRACT.

If an agreement contained in a fire policy, relied on to avoid payment, is fairly susceptible of two constructions, that construction will be adopted which is favorable to insured.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

2. INSURANCE—FIRE INSURANCE—ASSIGNMENT OF POLICY.

A provision of a fire policy that, "if this policy be assigned, without the consent of the association indorsed hereon," it shall be void, was not clearly violated by insured's writing thereon, when he mortgaged the house, "in case of loss by fire proceeds of policy to be paid to" mortgagee "as his interest may appear," so as to avoid the policy after payment of premiums.

(For other cases, see Insurance, Cent. Dig. §§ 883, 889; Dec. Dig. § 343.)

Appeal from Common Pleas Circuit Court of Abbeville County; Geo. E. Prince, Judge.

"To be officially reported."

Action by W. E. Henderson against the Abbeville Greenwood Mutual Insurance Association. From a judgment for plaintiff, defendant appeals. Affirmed.

J. Fraser Lyon, of Columbia, for Appellant.
 Tillman & Mays, of Greenwood, for Respondent.

* Decision rendered, March 16, 1914. 81 S. E. Rep. 171.

HRONISH vs. HOME INS. CO. OF NEW YORK.*

(Supreme Court of South Dakota.)

1. INSURANCE—FIRE POLICIES—CONTRACT.

The use of the standard form of fire policy prescribed by Laws 1909, c. 164, is compulsory, and its provisions not only constitute the contract between insurer and insured, but also the law governing the rights of the parties.

(For other cases, see Insurance, Cent. Dig. §§ 203, 211-213; Dec. Dig. § 133.)

2. INSURANCE — FIRE INSURANCE — CONDITION AGAINST CONCURRENT INSURANCE—WAIVER.

The standard fire policy prescribed by Laws 1909, c. 164, provides that the entire policy shall, unless otherwise provided by agreement indorsed or added thereon, be void, if the insured has or shall thereafter procure any other insurance on the property covered, and that the policy is made and accepted subject to that provision, and that no officer or agent shall have the power to waive any provision or condition, except such as by the terms of the policy may be the subject of agreement indorsed thereon. The previous statutory form provided that the insurer, in order to avail himself of any provision rendering the policy void, must promptly cancel it, but that provision was omitted in Laws of 1909. Held, in view of that omission, that there was no waiver of a breach of the condition, because the insured's agent had knowledge of the procurement of concurrent insurance, and did not attempt to have the policy canceled; the provisions against concurrent insurance being for the benefit of the public, intended to lessen the moral risk and to prevent fraudulent destruction of property.

(For other cases, see Insurance, Cent. Dig. §§ 1037, 1038; Dec. Dig. § 340.) McCoy and Whiting, JJ., dissenting in part.

Appeal from Circuit Court, Charles Mix County; R. B. Tripp, Judge. Action by Rudolph R. Hronish against the Home Insurance Company of New York. From a judgment for plaintiff, defendant appeals. Reversed.

Boyce, Warren & Fairbank, of Sioux Falls, for Appellant.
J. E. Tipton, of Geddes, and French & Orvis, of Yankton, for Respondents.

* Decision rendered, March 21, 1914. 146 N. W. Rep. 588.

ST. PAUL FIRE & MARINE INS. CO. ET AL. vs. KIRK-PATRICK ET AL.*

(Supreme Court of Tennessee.)

1. INSURANCE—FIRE INSURANCE—WAIVER OF FORFEITURE.

Forfeiture of a fire policy by the sale by insured of the damaged property, when the policy gave the company the option of taking the part of the articles saved from the fire at the appraised value, was waived by the company by thereafter demanding an arbitration and appraisement of the loss; such demand being equivalent to an admission of liability on the policy.

(For other cases, see Insurance, Cent. Dig. §§ 1078-1082; Dec. Dig. § 397.)

2. INSURANCE — FIRE INSURANCE — ADMISSION OF LIABILITY.

A demand by a fire insurance company for an appraisement and arbitration pursuant to the policy is equivalent to an admission of liability thereon.

(For other cases, see Insurance, Cent. Dig. §§ 1078-1082; Dec. Dig. § 397.)

3. INSURANCE—FIRE INSURANCE—ARBITRATION OF LOSS—REFUSAL TO ARBITRATE—EFFECT.

If insured fails to comply with a demand by the company for arbitration of the loss pursuant to an arbitration clause, he cannot sue thereon, and such refusal, if unreasonably persisted in, forfeits the policy, and, if the company refuses such a demand, insured may sue on the policy at once.

(For other cases, see Insurance, Cent. Dig. §§ 1435, 1520-1528; Dec. Dig. §§ 578, 612.)

4. INSURANCE—FIRE INSURANCE—APPRAISEMENT—FRAUD.

If an arbitration of the amount of loss fails because of fraud or intermeddling by insured, he cannot sue on the policy; and, if it fails by the fraud, etc., of the company, insured may abandon the arbitration and sue on the policy.

(For other cases, see Insurance, Cent. Dig. § 1435; Dec. Dig. § 575.)

5. INSURANCE—FIRE INSURANCE—ARBITRATION OF LOSS—REAPPRAISEMENT.

If the parties have appointed appraisers to determine the loss pursuant to an arbitration clause in a fire policy, and the appraisement has failed without fault of either party, insured cannot be required to select another arbitrator.

(For other cases, see Insurance, Cent. Dig. §§ 1422, 1423, 1427, 1429; Dec. Dig. § 572.)

6. INSURANCE—FIRE INSURANCE—ARBITRATION.

Upon the filing of a bill by a fire insurance company to set aside an award of arbitrators, the court acquired jurisdiction of the controversy, and could set aside the award and enforce the policies under a cross-bill.

* Decision rendered, April 3, 1914. 164 S. W. Rep. 1186.

praying for their enforcement, without the selection of new arbitrators.

(For other cases, see Insurance, Cent. Dig. §§ 1430-1432, 1434; Dec. Dig. § 574.)

7. INSURANCE—FIRE INSURANCE—AWARD OF ARBITRATORS—ACTIONS TO SET ASIDE—CROSS-BILL.

In a suit by fire companies to set aside an award of arbitrators, defendant could file a cross-bill to enforce the award, or, in the alternative, to enforce the policies, if the award was set aside.

(For other cases, see Insurance, Cent. Dig. §§ 1430-1432, 1434; Dec. Dig. § 574.)

8. INSURANCE—FIRE INSURANCE—NONPAYMENT OF PREMIUMS—PENALTIES—DEMAND FOR PAYMENT.

Under Acts 1901, c. 141, § 1, providing that insurance companies who refuse to pay the loss within sixty days after demand by the policy-holder shall be liable to pay the holder, in addition to the loss, a sum not exceeding 25 per cent on the liability for said loss, if such refusal to pay is not in good faith, a formal demand for payment must be made by the insured after maturity of the policy, and, if the company fails to pay within sixty days thereafter, insured may sue on the policy or award and recover the penalty, if the refusal was not in good faith.

(For other cases, see Insurance, Cent. Dig. § 1498; Dec. Dig. § 602.)

9. INSURANCE — FIRE INSURANCE — PAYMENT OF LOSS — DEMAND.

If no demand is made for arbitration of the loss under a fire policy, it matures, for the purpose of authorizing a formal demand for payment in order to fix the penalty pursuant to Acts 1901, c. 141, § 1, at the expiration of the number of days fixed in the policy for maturing; but, if the policy provides for payment a certain number of days after the filing of an award, the date of maturity would be governed by the number of days so fixed.

(For other cases, see Insurance, Cent. Dig. § 1498; Dec. Dig. § 602.)

10. INSURANCE—FIRE INSURANCE—NONPAYMENT OF LOSS—PENALTIES.

If an award of arbitrators as to the amount of loss under a fire policy was defective, and the company sued to set the award aside, no penalty could be imposed under Acts 1901, c. 141, § 1, imposing a penalty on the company for a bad-faith refusal to pay the loss within sixty days after demand; the time for making a formal demand for payment not having arrived.

(For other cases, see Insurance, Cent. Dig. § 1498; Dec. Dig. § 602.)

On Petition for a Rehearing.

11. INSURANCE—PENAL STATUTE—STRICT CONSTRUCTION.

Acts 1901, c. 141, § 1, imposing a penalty on insurance companies refusing in bad faith to pay the loss within sixty days after demand is made, is penal, and must be strictly construed.

(For other cases, see Insurance, Cent. Dig. § 1498; Dec. Dig. § 602.)

12. INSURANCE—FIRE INSURANCE—NONPAYMENT OF LOSS—PENALTY.

Under Acts 1901, c. 141, § 1, providing that, upon the refusal of an insurance company to pay the loss within sixty days after demand, it shall

be liable to pay a certain sum as a penalty, if the refusal was not in good faith, the failure to pay the loss within sixty days after demand would place the burden on the company of showing that such failure or refusal was in good faith.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.)

Appeal from Chancery Court, Bedford County; W. S. Bearden, Chancellor.

Suit by the St. Paul Fire & Marine Insurance Company and others against Ada Kirkpatrick and others, in which defendant named filed a cross-bill. From a decree in part for defendant on the cross-bill, complainants appeal. Affirmed in part, and reversed in part.

R. Lee Bartels, of Memphis, for Appellants.

Thomas N. Greer, of Shelbyville, for Appellees.



DRUMMOND vs. WHITE-SWEARINGEN REALTY CO.*

(Court of Civil Appeals of Texas. Amarillo.)

1. INSURANCE—FOREIGN CORPORATIONS—CIVIL LIABILITY OF AGENTS.

Under Rev. St. 1911, art. 4961, providing that any person soliciting insurance for any insurance company, or taking or transmitting, other than for himself, any application or policy, or receiving or delivering a policy, etc., shall be held to be the agent of the company, and article 4962, providing that any person doing any of such acts for or on behalf of any insurance company which has not complied with the requirements of the laws of this state shall be personally liable to the policyholder, an insurance agent, whose companies would not accept a particular risk, and who called the owner's attention to the advertisement of a broker in another state, and was asked by the owner to procure a policy through such broker, and did so procure a policy in a company not authorized to do business in this state, which he had never previously represented, was the agent of such company, and was personally liable on the policy.

(For other cases, see Insurance, Cent. Dig. § 126; Dec. Dig. §§ 96, 111.)

2. INSURANCE—FOREIGN CORPORATIONS—CIVIL LIABILITY OF AGENTS—DEFENSES.

Under Rev. St. 1911, art. 4962, making the agents of insurance companies acts on behalf of any insurance company which has not complied with the laws of this state, which, under article 4961, makes him the agent of such company, shall be personally liable to the holder of the policy of insurance in respect of which such act was done for any loss covered thereby, any legal defense available to the company is available to such agent.

(For other cases, see Insurance, Dec. Dig. § 111.)

* Decision rendered, Feb. 12, 1914. Rehearing denied, March 14, 1914.
165 S. W. Rep. 20.

3. INSURANCE—FOREIGN CORPORATIONS—CIVIL LIABILITY OF AGENTS—PLEADING.

Under Rev. St. 1911, art. 4962, making agents for insurance companies which have not complied with the requirements of the laws of this state personally liable to policyholders, and article 4874, providing that a fire policy in case of a total loss by fire shall be considered a liquidated demand for the full amount, an agent when sued has the burden of negating the loss asserted.

(For other cases, see Insurance, Dec. Dig. § 111.)

4. INSURANCE — AVOIDANCE FOR MISREPRESENTATION — STATUTORY PROVISIONS.

Under Rev. St. 1911, § 4874, providing that a fire insurance policy in case of a total loss shall be a liquidated demand against the company for the full amount thereof, and article 4948, providing that in suits on insurance policies no defense based upon misrepresentations made in the application or in obtaining or securing the contract shall be valid, unless defendant shall show that within a reasonable time after discovering the falsity of the representations it gave notice that it refused to be bound by the policy, a policy for \$4,000, where there was a total loss, was a liquidated demand for that amount, though the property was worth only \$1,000, where the insurance was not induced by any representation by insured.

(For other cases, see Insurance, Cent. Dig. § 1274; Dec. Dig. § 499.)

5. INSURANCE—FOREIGN CORPORATIONS—CIVIL LIABILITY OF AGENTS—DEFENSES.

Under Rev. St. 1911, art. 4962, making the agent of insurance companies which have not complied with the requirements of the laws of this state personally liable to policyholders, and article 4948, providing that no defense based upon misrepresentation in the application or in obtaining or securing any insurance contract shall be valid unless the insurer, within a reasonable time after discovering the falsity of the representation, shall give notice that it refuses to be bound by the contract, the agent is bound by the company's failure to give such notice.

(For other cases, see Insurance, Dec. Dig. § 111.)

Appeal from District Court, Cottle County; Jo. A. P. Dickson, Judge.
Action by the White-Swearingen Realty Company against T. M. Drummond. Judgment for plaintiff, and defendant appeals. Affirmed.

Bell & Bell, of Paducah, and Jas. H. Aynesworth, of Childress, for Appellant.

Browne & Hawkins, of Paducah, and Fires, Decker & Clarke, of Quanah, for Appellee.

TEXAS NAT. FIRE INS. CO. vs. WHITE, BLAKENEY & FULLER DRY GOODS CO.*

(Court of Civil Appeals of Texas. Texarkana.)

1. INSURANCE—FIRE INSURANCE—CONTRACTS—MODIFICATION—ACTS CONSTITUTING.

Where the insurer in a fire policy, covering a stock of merchandise while located in a designated building, agreed in a writing delivered to insured that the policy should cover the stock while in another building, and that insured could procure additional insurance, it could not deny liability on the ground that the writing was not attached to the policy, stipulating that no privilege affecting the insurance should be valid unless in writing attached to the policy.

(For other cases, see Insurance, Cent. Dig. §§ 273-275; Dec. Dig. § 144.)

2. INSURANCE—FIRE INSURANCE—STIPULATIONS—WAIVER.

The act of insured, who procured a fire policy on a stock of merchandise while located in a designated building, in removing the stock to another building, was not a breach of the policy, and an agent without authority to waive breaches may agree to a modification of the policy so as to make it apply to the stock while in the second building.

(For other cases, see Insurance, Cent. Dig. §§ 273-275; Dec. Dig. § 144.)

3. INSURANCE — CONTRACTS — MODIFICATION — CONSIDERATION.

A modification of a fire policy covering a stock of merchandise while located in a described building so as to cover the stock when removed to another building is supported by a sufficient consideration, consisting of the forbearance of insured to demand a cancellation of the policy and a return of the unearned premium paid on it.

(For other cases, see Insurance, Cent. Dig. §§ 273-275; Dec. Dig. § 144.)

Appeal from District Court, Fannin County; Ben. H. Denton, Judge. Action by the White, Blakeney & Fuller Dry Goods Company against the Texas National Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Goree & Turner, of Ft. Worth, for Appellant.

J. G. McGrady, of Ft. Worth, and Cunningham & McMahon, of Bonham, for Appellee.

* Decision rendered, Feb. 3, 1914. Rehearing denied, Feb. 19, 1914.
165 S. W. Rep. 118.



HOME INS. CO. vs. PETERMAN.*

(Court of Civil Appeals of Texas. Texarkana.)

1. APPEAL AND ERROR—REVIEW—HARMLESS ERROR.

Where the evidence showed no breach of a condition that a fire policy should be void if the property should be vacant "or" unoccupied for ten days, the error in a charge which required the property to be both unoccupied and vacant for a period of ten days is harmless.

(For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. §: 1066.)

2. INSURANCE—FIRE INSURANCE—ACTIONS—EVIDENCE.

In an action on a fire policy, evidence *held* to show that the condition that the policy should be void if the building should be vacant or unoccupied for ten days was not broken.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

Error to Titus County Court; Sam Porter, Judge.

Action by H. W. Peterman against the Home Insurance Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Wm. Thompson and Will C. Thompson, both of Dallas, for Plaintiff in Error.

J. M. Burford, and T. C. Hutchings, both of Mt. Pleasant, for Defendant in Error.

* Decision rendered, March 19, 1914. Rehearing denied, March 26, 1914. 165 S. W. Rep. 103.

MARINE.**VICTORIA S. S. CO. vs. WESTERN ASSUR. CO. OF
TORONTO (S. F. 6,042.)*
(Supreme Court of California.)****1. INSURANCE—INSURABLE INTEREST—FREIGHTAGE.**

Under Civ. Code, § 2662, providing that the owner of a ship has an insurable interest in expected freightage which he would have certainly earned except for the intervention of the peril insured against, a steamship company has an insurable interest on the freightage on a cargo of lumber, which it was loading at the time the covering agreement for insurance was made, which became effective and attached as the loading proceeded.

(For other cases, see Insurance, Cent. Dig. §§ 139-157, 177; Dec. Dig. § 115.)

2. INSURANCE — CONSTRUCTION OF CONTRACT — CONDITIONS PRECEDENT.

A provision that insurance on the freight was to be subject to the satisfactory survey and loading certificate of the surveyor or the board of underwriters at the port of loading does not make it a condition precedent that the certificate be submitted to the insurer and be approved by it, but only requires that the condition of the vessel and the stowage of the cargo should be satisfactory to the surveyor, who may be regarded as the agent of the insurer, or at least as the joint agent of both parties.

(For other cases, see Insurance, Cent. Dig. § 570; Dec. Dig. § 269.)

3. INSURANCE—CONSTRUCTION OF CONTRACT—COVERING AGREEMENT.

The rules that insurance policies are to be construed most strongly in favor of the insured, and any uncertainty or ambiguity should be interpreted most strongly against the insurer, and that courts are disinclined to treat the stipulations of a contract as conditions precedent apply with greater force to a covering agreement, which is merely preliminary, than to the policy itself.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

4. INSURANCE—CONSTRUCTION OF CONTRACT—"VALUED POLICY"—INSURANCE OF FREIGHTAGE—"OPEN POLICY."

A covering agreement for the insurance of freightage on a cargo of lumber, where the quantity to be carried was to be determined by the charterer, and the rate was already established, was not an open policy, which is defined by Civ. Code, § 2594, as one in which the value of the thing insured was not agreed upon, but was left to be determined in case of loss, but was a valued policy, which is defined by Civ. Code, § 2595, as one which expresses on its face an agreement

* Decision rendered, March 9, 1914. Rehearing denied, April 9, 1914.
139 Pac. Rep. 807.

that the thing insured should be valued at a certain sum, since the only undetermined factor, the quantity of lumber to be loaded, was beyond the control of the insured.

(For other cases, see Insurance, Cent. Dig. §§ 359, 360; Dec. Dig. § 172.)

(For other definitions, see Words and Phrases, vol. 8, p. 7282; vol. 6, pp. 4987, 4988.)

5. INSURANCE — CONSTRUCTION OF CONTRACT — CONDITIONS PRECEDENT.

In such an agreement, a stipulation that the assured would declare the amount as soon as known, when the policy would be issued upon payment of the premium, was not a condition precedent to the agreement becoming effective.

(For other cases, see Insurance, Cent. Dig. § 570; Dec. Dig. § 269.)

6. INSURANCE—FORFEITURE FOR BREACH OF PROMISSORY WARRANTY—STATUTORY PROVISIONS.

Civ. Code, § 2608, provides that a statement in a policy that it is intended to do or not to do a particular thing which materially affects the risk is a warranty that such act or omission shall take place. Section 1610 provides that the violation of a material warranty or other material provision in the policy by either party entitles the other to rescind. Section 2611 provides that a policy may declare that a violation of specific provisions thereof may avoid it; otherwise the breach of an immaterial provision does not avoid it. *Held*, that section 2608 and 2610 apply to an express as well as an implied warranty, and under these three sections the common law rule that a breach of an express warranty avoids the policy, whether material or not, does not apply.

(For other cases, see Insurance, Cent. Dig. §§ 558, 559, 562-566; Dec. Dig. § 264.)

7. INSURANCE—FORFEITURE FOR BREACH OF PROMISSORY WARRANTY—MATERIAL WARRANTY.

An agreement by the insured to declare the amount of lumber shipped, the freight upon which was insured by a covering agreement while the vessel was loading, was not an agreement to do an act which materially affected the risk, since such declaration could not change the amount of the premium or the liability of the insurer in case of loss, and therefore a breach of such stipulation does not avoid the insurance.

(For other cases, see Insurance, Cent. Dig. §§ 558, 559, 562-566; Dec. Dig. § 264.)

8. INSURANCE — EXTENT OF LIABILITY OF INSURER — CONSTRUCTIVE TOTAL LOSS.

Civ. Code, § 2703, provides that a total loss may be either actual or constructive. Section 2705 provides that a constructive total loss is one which gives the insured a right to abandon the thing insured as provided in section 2717, which gives the right to abandon, where freightage is insured, in case the vessel is abandoned, where the voyage cannot be performed in another vessel within a reasonable time without incurring an expense of more than half the value of the thing abandoned. *Held*, that the freight on the amount of lumber jettisoned in an effort to save the vessel could be added to the expense of salvage and transshipment chargeable to the freight, and, if these items amounted to more than one-half the freightage insured,

the insurer was liable, though the covering agreement provided that it was free from partial loss.

(For other cases, see Insurance, Cent. Dig. §§ 1192-1227; Dec. Dig. § 469.)

9. INSURANCE — EXTENT OF LIABILITY — CONSTRUCTIVE TOTAL LOSS—DETERMINATION.

Under Civ. Code, § 2705, defining a constructive total loss, it is not necessary that there should be an actual abandonment; it is sufficient if the right to abandon exists.

(For other cases, see Insurance, Cent. Dig. §§ 1192-1227; Dec. Dig. § 469.)

Department 1. Appeal from Superior Court, city and county of San Francisco; J. M. Seawell, Judge.

Action by the Victoria Steamship Company against the Western Assurance Company of Toronto. Judgment for the defendant, and plaintiff appeals. Reversed.

Rehearing denied; Beatty, C. J., dissenting.

Page, McCutchen & Knight, Page, McCutchen, Knight & Olney, McCutchen, Olney & Willard, and Ira A. Campbell, all of San Francisco, for Appellant.

Andros & Hengstler and Louis T. Hengstler, all of San Francisco, for Respondent.

ACCIDENT AND HEALTH.

**UNITED STATES CIRCUIT COURT OF APPEALS.
SIXTH CIRCUIT.**

RAILWAY MAIL ASS'N

vs.

MOSELEY ET AL. (No. 2,382.)*

1. INSURANCE—ACTIONS ON POLICIES—QUESTIONS FOR JURY.

In an action on a policy, insuring against sudden or violent death from external causes not the result of the member's own vicious conduct, evidence *held* to make a question for the jury as to whether insured was assaulted by an officer and shot while fleeing to save his life, and hence the direction of a verdict for the insurer was properly denied, even if the insurer would not be liable if insured assaulted the officer and was shot by the officer for the purpose of avenging himself.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.)

2. INSURANCE—CONSTRUCTION—CONSTRUING AGAINST INSURER.

A policy, insuring against sudden violent death from external causes "not the result of the member's own vicious conduct," was ambiguous and susceptible of more than one construction, and should therefore be construed more strongly against the insurer.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

3. HOMICIDE — JUSTIFIABLE HOMICIDE — KILLING WHILE MAKING ARREST OR PREVENTING ESCAPE.

Under some circumstances a police officer in whose presence a criminal act is committed may pursue the offender if the offense is a felony, and kill him if he cannot otherwise take him, but he may not kill the offender if the offense is a misdemeanor.

(For other cases, see Homicide, Cent. Dig. § 135; Dec. Dig. § 105.)

4. INSURANCE—LIFE INSURANCE—DEATH CAUSED BY VIOLENT CONDUCT.

If the holder of a policy insuring against sudden violent death from external causes not the result of the member's own vicious conduct shot a police officer and fled from arrest and could not be otherwise taken, a killing by the officer while he was so fleeing was justifiable and the direct and proximate result of insured's vicious conduct.

(For other cases, see Insurance, Cent. Dig. §§ 1166-1169; Dec. Dig. § 455.)

* Decision rendered, Feb. 11, 1914. 211 Fed. Rep. 1.

5. INSURANCE — LIFE INSURANCE — DEATH CAUSED BY VICIOUS CONDUCT.

If the holder of a policy, insuring against sudden violent death from external causes not the result of the member's own vicious conduct, shot a police officer and fled and was pursued by the officer and shot, not for the purpose of arresting him or preventing his escape, but to avenge his own injury, the death was not the direct and proximate result of insured's vicious conduct, and the insurer was liable; and hence the court properly so charged, and properly refused to charge that if insured came to his death by being shot by the officer, whom he had previously shot without provocation, to find for defendant.

(For other cases, see Insurance, Cent. Dig. §§ 1166-1169; Dec. Dig. § 455.)

6. TRIAL—INSTRUCTIONS—NECESSITY OF REQUESTS.

In an action on a policy, insuring against sudden violent death from external causes not the result of the member's own vicious conduct, where it was not an unnatural implication from the testimony of the officer who shot insured that insured, after firing one shot at the officer, did not attempt to keep up the fight until he had been pursued by the officer for at least 600 feet, the failure of the court to hypothesize the theory of a continued cross-fire and running fight following the first shot, and the theory of self-defense, was not error, where no instructions on these theories were requested.

(For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.)

In Error to the District Court of the United States for the Western District of Tennessee; Jno. E. McCall, Judge.

Action by Mollie Moseley and others against the Railway Mail Association. Judgment for plaintiffs, and defendant brings error. Affirmed.

Before Knappen and Denison, C. JJ., and Hollister, D. J.

C. L. Marsilliot and Walter C. Chandler, both of Memphis, Tenn., for Plaintiff in Error.
Bell, Terry & Bell, of Memphis, Tenn., for Defendants in Error.

HOLLISTER, D. J.

This case involves the construction of a clause in a contract of insurance, issued by Railway Mail Association, plaintiff in error, to Emmett F. Moseley, a railway mail clerk at Memphis, Tenn., by which it was agreed, among other things, that if the insured should receive bodily injuries, resulting in death from such injuries alone, within 180 days therefrom, during the continuance of the insurance, through external, violent, and accidental means, the defendant would pay his sisters, the defendants in error, \$4,000, less such sum as might have been paid as weekly indemnity during the disability that caused his death.

The clause in question defines accidental death:—

"Accidental death shall be construed to be either sudden, violent death from external causes not the result of the member's own vicious conduct, or death within one hundred and eighty days from injuries received by accident alone."

Moseley was a colored man of nearly white complexion. While the insurance was in force, he was shot and instantly killed at Memphis by Burns, a police officer of that city.

To the declaration in the suit below, brought by Moseley's sisters, the defendant interposed the plea:—

"That said Emmett Moseley lost his life on or about the 22d day of August, 1911, as the direct and proximate result of his own vicious, violent, and intemperate conduct, in that late in the evening on said date said Emmett Moseley, while committing an unlawful trespass upon private property in the city of Memphis, Tenn., was ordered off of said property in a quiet and peaceable manner by a regularly constituted police officer of the city of Memphis, who was in charge of said property; that said Moseley, being then and there engaged in another violation of the law, to wit, in carrying a concealed, dangerous weapon, a pistol, without any reason or provocation, there and then committed a murderous assault upon said police officer by shooting said police officer with said pistol, whereupon said police officer in defense of his life shot and killed said Moseley, all in express violation of the terms and conditions of the policy sued on in this cause."

The jury brought in a verdict for the plaintiffs in the full amount of the policy and interest, for which judgment was rendered with costs.

The errors assigned, including the refusal of the court to grant defendant's motion made at the close of all of the testimony to instruct the jury to find for the defendant, all relate to the construction put by the court, under the testimony in the case, upon the clause in the contract defining accidental death.

[1] That Moseley's death was sudden and violent from a pistol shot at the hands of Burns was not disputed; and the questions were whether or not Moseley had been guilty of vicious conduct, and, if so, whether or not his death was the direct and proximate result thereof.

Burns testified:—

"Well, at five minutes after 9, on August 22, 1911, I went through the Dan Shea Boiler Works, one of my customers or clients, to see that their property was all right, and we have an electric patrol system—an electric box—four boxes located at various points in the building; the first box is on the corner of Washington, and I went to that box first and pulled that box first and went from there to the second, and intended to pull it, and when I got almost to it, I saw a man standing up, and a woman laying down, and I flashed my lamp, and I told them to get out of there, and this woman got up and preceded me; I didn't intend to make any arrest, or anything, but intended to flash on the lamp to show them the way out; I told this man that I was an officer, and if I caught him around there any more, I would arrest him, and when we got out to the road—that is, to the road going

to the railroad that is between the office and the boiler shops, why, I heard a shot and felt something strike me in the back, although I felt no pain, although I could feel the blood running down, and this man I had seen a minute before, he ran around to Poplar street depot, and I grabbed my pistol—as soon as I could get it—I grabbed my pistol out and fired a shot at him, and missed him; in the meantime, he ran towards the depot, and I ran after him as quick as I could; I couldn't shoot for the number of railroad men there, and when I got down about on a line with the fourth electric light inside the shed, about midway between Exchange street and Poplar street, I saw this man step behind a coach, and he dropped there, and I ran around the corner of the coach, and he fired another shot at me, and I shot back, and then he ran possibly fifty feet, and I fired a second shot and killed him; in the meantime, I had fallen down between the second and third shots, and I got up again, and I saw he still held his pistol, and I staggered up to him, and took his pistol away from him, thinking that he might shoot back, and when I got there and took hold of the pistol, I saw he was dead; so I laid down there until the patrol wagon came and got me and carried me to the hospital."

He also said that it was about one hundred yards from the boiler works to the south end of the shed, and where he was shot was about one hundred feet further south than the north end of the boiler works. If this is true, it would make the distance from where he says he was shot to the place where some of the witnesses first located the two shots at the south end of the shed as much as four hundred feet. This is an appreciable distance, even when men are running, and reflects upon the question as to where the first two shots were fired, as well as upon the quality of Burns's conduct. The jury may have found, and could find, from all the evidence in the case, that those shots were actually fired at the south end of the shed, and not at the boiler works at all.

The unfortunate woman referred to denies being present in the boiler works, though she was later arrested in the vicinity, but just how far away is not made clear; and she denies ever having had to do with negroes. Burns alone testifies to Moseley's presence in the boiler works, if indeed, he was present. It is difficult, from the testimony, to lay with accuracy the scene of the killing, because of the lack of exact location of fixed objects referred to, and their distances from each other. But it may be gathered from the testimony and a map of the city of Memphis (itself lacking in notations of distances) that on the south of the railroad shed spoken of in the testimony, is Poplar street, and to the south of Poplar street the boiler works are located. How wide Poplar street is does not appear. Whether the shed covers the whole distance between Poplar street and the street at the north of the railroad station and the length of the shed do not appear. It

may be gathered from the testimony and the briefs of counsel that the distance between the boiler works and the place where Moseley fell dead is about 600 feet; it may be more than that. There was a train of cars standing in the station, the most southerly of which, an express car, was probably midway of the shed.

Moseley lived with his brother and sisters, not far away from the station. How far does not appear. He left home to mail a letter at the station. One of the witnesses talked with him on the subject at the station within a very short time before he was killed. There is substantial agreement among the witnesses that the killing took place between 9 and 10 o'clock, probably not earlier than quarter past 9. There were electric lights in the station. The news was telephoned to Moseley's brother, who testified that Moseley had been away about forty-five minutes. Moseley was twenty-one years of age, and had a good reputation for peacefulness.

The weight of the evidence fixes the firing of the initial two shots at the south end of the station. There was some evidence that the sound of footsteps preceded any shooting. It was substantially proved that Moseley and Burns, the former leading, were running rapidly northwardly in the station. It was established that Burns had a pistol in his hand. Some witnesses say Moseley had a pistol in his hand while running, and others that he did not. Moseley ran past the south end of the car and at the west of it, there being evidence tending to show that Burns was gaining upon him, and, at a distance of perhaps fifteen or twenty steps, shot him; Moseley fell; but regained his feet quickly, at which time Burns was but a few feet from him, and ran back southwardly and around the south end of the car toward the east, "circling around" the end of the car; Burns taking a wider circle, and with an oath, saying, "I am going to kill you," shot again at Moseley, who fell dead, shot twice in the back.

There is evidence tending to show that Burns himself fell down, or lay down, shouting: "You all seen him shoot me first," and others say he said, "He shot me first."

There is evidence tending to show that at the corner of the car Moseley stopped and shot twice at Burns.

If Moseley lingered at the end of the car to shoot Burns, the length of time he lingered must have been very brief—indeed scarcely appreciable. But it is quite possible, and from all the evidence the jury could have found, that the shooting of Burns occurred at that time and immediately before he killed Moseley. Two pistols were found in front of Burns. Burns was undoubtedly shot, and in the back, but whether the shot came directly from behind, or made a glancing wound in the back, does not appear.

There was evidence tending to show that Burns, while pursuing Moseley, called out: "Stop that man!"

It would not be practicable to set out all the evidence at length. It is not necessary to do so, because sufficient is shown upon which a number of hypotheses might be based for submission to the jury.

[2] Before considering these in detail it may be said that the meaning of the language in the clause in question is not clear and under the circumstances becomes ambiguous and susceptible of more than one construction. It should therefore be construed more strongly against the insurer. Am. Surety Co. vs. Pauly, 170 U. S. 133, 144, 18 Sup. Ct. 552, 42 L. Ed. 977. But, passing this rule of construction as one not involving a vital question in the case we proceed.

From one aspect of the case the jury might find that Moseley was killed while fleeing from arrest for some offense, whether a misdemeanor or a felony. Strangely enough, Burns does not claim that Moseley was resisting arrest or fleeing to escape arrest, but claims only that he killed Moseley in self-defense.

[3, 4] Under some circumstances, a police officer, in whose presence a criminal act is committed, may pursue the offender fleeing from arrest, and, if the offense is a felony, may kill the offender if he cannot take him otherwise; but he may not kill him if the offense is a misdemeanor. 2 Cooley's Blackstone (3d Ed.) 292; 1 East's Pleas of the Crown, 302; Williams vs. State, 44 Ala. 41; Reneau vs. State, 2 Lea (70 Tenn.) 720, 31 Am. Rep. 626; Head vs. Martin, 85 Ky. 480, 3 S. W. 622; State vs. Sigman, 106 N. C. 728, 11 S. E. 520; Thomas vs. Kinkead, 55 Ark. 502, 18 S. W. 854, 15 L. R. A. 558, 29 Am. St. Rep. 68. If Moseley was a trespasser on the property of the boiler works, and if he carried a pistol, those offenses may be assumed, under the laws of Tennessee, to be misdemeanors. If Moseley did shoot Burns in the back at the boiler works, he was guilty of a felony, and if he fled from arrest and could not be overtaken, and was killed by Burns while so fleeing, Burns had the right to kill him if he could not take him otherwise. And such killing would have been the direct and proximate cause of Moseley's vicious conduct. Or, if immediately upon being shot, Burns, to save his own life or to save himself from great bodily harm, had then and there killed Moseley, there might be good ground for claiming the necessity of self-defense in taking human life, and so make Moseley's misconduct the direct and proximate cause of his death. Or if Moseley's death occurred in a continuing running fight and cross-fire, his death might be said to have been the proximate result of his own conduct. But the facts necessary to support these defenses were not, to say the least, undisputed; and it cannot be said that there was not room for a conclusion that Burns, pistol in hand, assaulted Moseley, and that the latter thereupon fled to save his

life. Therefore, apart from the legal effect of a finding that Burns, after being shot in the back at the boiler works, pursued Moseley, not to arrest him, nor in self-defense, but only for the purpose of avenging himself upon him, it is clear that there was no error in refusing to direct a verdict for defendant.

[5] The hypotheses above mentioned (except those of self-defense and the running fight and cross-fire, which are not involved in the assignments presented) were clearly submitted to the jury in the following language:—

"If you believe from this evidence that the assured was assaulted by this police officer, Burns, and then ran, and he pursued him, as the proof shows was done in this case, and shot him, then the plaintiff is entitled to a recovery.

"If you believe from the evidence that this police officer came upon the assured in Shea's warehouse in company with a woman, and he told him to get out, and in going out, the assured shot him in the back, and ran to get out of his way, and Burns followed him with the intention of revenging himself for the shot which had been inflicted upon him, and not for the purpose of arresting Moseley, and shot him, then the plaintiff would be entitled to recovery.

"If, however, you believe from the preponderance of the evidence in this case that this man Burns was a police officer and was attempting to arrest Moseley and the man shot him, and that Burns pursued him for the purpose of arresting him, and in the shed the deceased turned on him and shot at him, and then Burns fired and wounded him, then the company would not be liable, and you should find for the defendant.

"The distinction I am seeking to make is this, so that you may understand it. In the one case, if the colored man shot him in the back, and ran to get out of his way, and this man, Burns, to avenge himself upon him, pursued him and shot him, then the company is liable, but if the man was attempting to arrest the deceased in the warehouse for the violation of the law, and the negro shot him and ran, and this officer pursued him to arrest him for the law he had violated, and not for shooting him, and the colored man turned upon him and shot him, or shot at him, and the officer then shot him and killed him, plaintiffs cannot recover, because in the latter case he was pursuing his duty as an officer in arresting the man for violation of the law, and if the deceased resisted that, and continued to resist it, while he was trying to arrest him for that violation of the law, then his death would have come about from his own vicious conduct, and he could not recover, whereas, if he shot Burns in the back and ran, and abandoned the difficulty, and was trying to get away, he would not have been killed, except the officer pursued him and shot him. The officer was not authorized to inflict punishment upon the deceased for having shot him. That is the business of the courts

and juries. Under the law, as I interpret it, if Moseley came to his death at the hands of this officer, who was seeking revenge for shooting him, it could not be said that was the result of the vicious conduct of Moseley in the warehouse."

Counsel for the defendant excepted to so much of the charge as instructed the jury that if Moseley shot Burns and ran, and Burns pursued him to avenge his own injury, this would not be vicious conduct within the meaning of the policy, and the plaintiffs might recover. We think this instruction was proper.

Another objection was:—

"The defendant objects to that part of the charge of the court which instructs the jury that unless they find from the evidence that the deceased, Emmett Moseley, was killed while resisting arrest, there can be a recovery by the plaintiff."

The court did not so instruct the jury. It is true that the theory of self-defense and the theory of the running fatal fight, both combatants shooting, were not submitted to the jury, but counsel for defendant made no objection to the charge for that reason, nor did he at any time request a charge on those phases of the case. The defendant, therefore, takes nothing by this exception as heretofore shown.

In the motion for a new trial and in the assignments of error is found a claim that the court erred in refusing defendant's special request to charge the jury:—

"If you find from the evidence that Emmett Moseley came to his death by being shot by W. F. Burns, whom he had previously shot on the premises of Dan Shea Boiler Works, without provocation on the part of said Burns, then your verdict should be for the defendant."

The record of the trial does not apparently disclose any such request, but if, indeed, it was made, the charge would not have been proper, for it entirely ignores the important consideration that Moseley's misconduct, in order to avoid the policy, must have been the direct and proximate cause of his death.

It is true that Burns is not on trial for murder in this case, yet it was necessary for the jury to consider the quality of his conduct in determining whether or not Moseley met his death as the direct and proximate result of his own vicious conduct, for, if he was murdered by Burns, then, as will appear, his death resulted directly and proximately, not from his own initial wrong, whatever it was, but from the crime of Burns.

If the exemption in this policy had been for accidental death resulting from the negligence of the insured, and it appeared on the trial that while he was negligent, yet the proximate cause of his injury, as recognized in the law, was the negligence of another, it could not be successfully claimed that the injury to the insured resulted from his own negligence. There must be

proximation, such as the law recognizes, between cause and effect (or result) before a given effect, or result, may be ascribed to that cause. The defendant recognizes that the "result" the parties to the contract had in mind has the same meaning the law would give it, for in the plea it is averred that Moseley lost his life "as the direct and proximate result of his own vicious conduct."

If Moseley shot Burns at the boiler works, and Burns in hot blood at the moment instinctively had shot and killed Moseley (which is quite different from pursuing Moseley, and twice shooting him in the back while he was running away), the resulting death might, with some force, be charged to Moseley's conduct as its cause (*Murray vs. Insurance Co.*, 96 N. Y. 614, 618, 48 Am. Rep. 658); and, of course, if Burns killed Moseley in self-defense, Moseley's death would, no doubt, have been the proximate result of his own conduct against which Burns must protect himself. Or, if death ensued during an exchange of shots in a running fight, it might be said to proximately result from Moseley's conduct. And if Moseley had committed the felony of shooting Burns in the back, and his own death resulted while resisting arrest, no one would doubt that he lost his life as the direct and proximate result of the vicious conduct involved in resisting an officer of the law in the lawful discharge of his duty.

On the other hand, if Moseley had shot Burns in the back and escaped, and Burns, after being in the hospital for two weeks, as he says he was, met Moseley on the street and arrested, or sought to arrest, him, and killed him while he was trying to escape, it could not be said that Moseley's conduct at the boiler works was the cause of his death. In that case, also, the cause would be his resistance to lawful authority. And if, in so meeting, Burns did not intend to arrest him, or try to arrest him, but drew his pistol and shot him while running away, for the purpose of avenging the injury to himself, all would probably agree that his death was not the direct and proximate result of whatever viciousness he had displayed at the boiler works, but was the result of unjustifiable homicide at Burns's hands.

But when the circumstances make a case which does not fall within either of these extremes, where shall the line be drawn with respect to which it may be said that all cases falling on one side of it are of such character that the cause of death shall be ascribed to the conduct of the insured, and in all cases falling on the other side of it the death shall be charged to the conduct of the one by whose unlawful act the death was in fact brought about? Manifestly, if the killing is the lawful act of the one who does it, the result cannot be ascribed to him as the guilty cause of it; and it is equally true that if the death results

from the unlawful conduct of the slayer which was not the natural and reasonably to be expected consequence of the conduct of the one slain, then the slayer's vicious conduct is the guilty cause, and not the conduct of him who is slain, whatever it may have been.

The line, then, must be drawn where the law draws it, and the resulting death must be ascribed to its cause in law, and not to a cause which in itself and of itself does not proximately lead to the fatal result, and is only a condition under which that result happened.

While no case has been cited involving a clause just like the one in question, yet there are a number of cases in which the agreement was that the policy was void if (in substance) the insured should die in the known violation of any law, or in consequence of any unlawful act. The clauses vary in language, but these two are illustrative of the others.

In these cases the courts were dealing with cause and effect, as we are here; in all of them they were construing contracts in order to ascertain the meaning of the parties; in all of them they were of opinion that "result" means "proximate result," as the law would define it, and in all of them, when the insured has lost his life, no matter how heinous his initial conduct may have been, through the crime of the slayer, the resulting death was ascribed to the unlawful conduct of the slayer as its proximate cause, and the beneficiaries in the policies were permitted to recover.

In Utter vs. Insurance Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913, in which the policy under consideration provided, among other things, that no claim could be made under it when the death happened while the insured was engaged in or in consequence of any unlawful act, it appears that the insured, a minor and deserter from the army, was shot and killed in a house of ill fame by a police officer who, without a warrant and acting under instructions of the under-sheriff, went to the place where the deserter was for the purpose of arresting him. There was evidence tending to show (if one of the witnesses who was in the house was to be believed) that the insured was killed in a wanton and murderous manner. The trial judge had directed a verdict for the insurance company. This was held to be error, not only upon the ground which the direction was made, but also because the Supreme Court were of opinion that the question whether or not the insured was doing anything unlawful at the time he was killed should have been left to the jury; and the court said (65 Mich. 553, 32 N. W. 815, 8 Am. St. Rep. 913):

"Nor can it be held, as a matter of law, that Utter was engaged in an unlawful act, within the meaning of this policy. If he had been shot in the act of deserting, this claim might be made with some reason and propriety, but such was not the case

here. Neither was he shot because he was a deserter, nor because he was in a house of ill fame."

In other words, from one aspect of the case, the cause of his death was not that he was at the time engaged in, or his death resulted as a consequence of any unlawful act of his, but the cause of it was the unlawful act of the officer in killing him.

The general term of the Supreme Court of New York had before them the case of Goetzman vs. Insurance Co., 3 Hun (N. Y.), 515, in which the company was exempted "if the assured shall die by suicide or in consequence of his violation of any law." It appeared that the assured, being caught by one Hesler immediately after having committed adultery with his wife, was shot and killed by him. The court were of opinion that, however great a violation of law and morals the assured's act was, yet that offense had been completed and the assured was about to go away; that the act of Hesler in killing the assured was a crime, and (3 Hun, 518) :—

"If the assured had been killed a week or a year after the injury, for the same cause, it would have been quite as direct a result thereof as when it was done. In short, the proposition that a man, who has been thus wantonly killed by another, without necessity or lawful excuse, died in consequence of his own act, is logically contradictory, unless it be admitted that the killing of an adulterer follows his offense in the ordinary sequence of events. That admission we are not prepared to make."

The question put by Chief Justice Hill of the Supreme Court of Arkansas, in Supreme Lodge vs. Bradley, 73 Ark. 274, 276, 83 S. W. 1055, 1056 (67 L. R. A. 770, 108 Am. St. Rep. 38, 3 Ann. Cas. 872), which, by their decision, the court answered in the negative, was this:—

"Is a death received while retreating from a personal difficulty (and not retreating for the purpose of gaining a vantage ground to renew it), where the encounter is begun by an assault by the deceased upon his slayer with a weapon capable of inflicting great bodily harm or death, according to its use, a death within the meaning of an insurance clause exempting against liability for a death 'in violation or attempted violation of any criminal law'?"

It appeared that one Bradley entertained ill feeling toward one Morschheimer. They met at the entrance of the courthouse; Morschheimer entering, and Bradley leaving, the building. Words passed; Bradley struck Morschheimer on the ear with a piece of iron. Morschheimer staggered, stepped back a few paces, drew his pistol, and began firing at Bradley. One of the shots, not fatal, struck Bradley in the breast. When Morschheimer began firing, Bradley turned and ran back into the courthouse, and, in attempting to enter the sheriff's office twenty-four feet away from the place where the affray began, fell into the

arms of the sheriff, having received a fatal wound in the back from which he died almost immediately. He received the fatal wound immediately after he had turned and fled. There is much in the opinion of the learned Chief Justice pertinent to the issue here, but what he says about the proximate cause of Bradley's death is especially apt (73 Ark. 278, 83 S. W. 1057, 67 L. R. A. 770, 108 Am. St. Rep. 38, 3 Ann. Cas. 872) :—

"There must be a line drawn somewhere between consequences proximately, and those remotely, flowing from an unlawful assault; and the safe place to draw that line is where the law draws the line of lawful resistance to the unlawful assault."

And then he proceeds to say that Bradley was fleeing from the conflict, and received his wound in the back while escaping, and that Morsheimer was not legally justified in taking Bradley's life under those circumstances.

"Therefore, the first violation of the law by Bradley was not the proximate cause of his death, but the subsequent unlawful act of Morsheimer in shooting his retreating assailant was the proximate cause."

To the same effect are Harper's Adm'r vs. Insurance Co., 19 Mo. 506; Overton vs. Insurance Co., 39 Mo. 122, 90 Am. Dec. 455; Cluff vs. Insurance Co., 13 Allen (Mass.) 308; Bradley vs. Insurance Co., 45 N. Y. 422, 6 Am. Rep. 115; Griffin vs. Benevolent Ass'n, 20 Neb. 620, 31 N. W. 122, 57 Am. Rep. 848; and Supreme Lodge vs. Crenshaw, 129 Ga. 195, 58 S. E. 628, 13 L. R. A. (N. S.) 258, 121 Am. St. Rep. 216, 12 Ann. Cas. 307.

There is a class of cases of which Taliaferro vs. Protective Ass'n, 80 Fed. 368, 25 C. C. A. 494, and Casualty Co. vs. Stacey's Ex'rs, 143 Fed. 271, 74 C. C. A. 409, 5 L. R. A. (N. S.) 657, 6 Ann. Cas. 955, are examples in which the insurance was against death by accident. Under the circumstances in these the courts were of opinion that the fatal result to the insured was to be expected from what he did, and was the natural and logical results of an intentional act on his part, and hence could not be regarded as an accident in any sense in which that word has been defined in the books.

In Gresham vs. Insurance Co., 87 Ga. 497, 13 S. E. 752, 13 L. R. A. 838, 27 Am. St. Rep. 263, the policy excepted, among other things, accidental injuries caused by fighting, and recovery was denied because the insured was killed while the fight with his slayer was continuing, though from the facts it cannot be said that the slayer was legally justified in what he did.

But that case is distinguished in Supreme Lodge vs. Crenshaw, 129 Ga. 195, 58 S. E. 628, 13 L. R. A. (N. S.) 258, 121 Am. St. Rep. 216, 12 Ann. Cas. 307, in which the policy provided that if death is caused or superinduced at the hands of justice, or in violation of, or attempt to violate, any criminal law, the in-

surer would not be liable for the full amount of the policy. In that case the insured was killed by a husband, either while he was attempting to commit adultery with the wife, or immediately after the act was completed. It was held (129 Ga. 200, 201, 58 S. C. 630, 13 L. R. A. [N. S.] 258, 121 Am. St. Rep. 216, 12 Ann. Cas. 307) that the policy must be given a reasonable construction, and that the liability of the company is not to be discharged—

“unless the violation of the law consisted in an act of which the death of the insured was the reasonable and legitimate consequence. * * * But there must be something in the act itself, independent of other circumstances, which makes the death the reasonable consequence.”

And then, referring to *Gresham vs. Insurance Co.*, 87 Ga. 497, 13 S. E. 752, 13 L. R. A. 838, 27 Am. St. Rep. 263, the court makes a distinction between a case of death resulting immediately from hot blood engendered by fighting and while the fight is in progress and cases in which the death cannot be immediately ascribed to the unlawful conduct of the insured, however great a provocation that act may have given the slayer, because the death in such cases is not the reasonable, natural, logical, direct, or proximate result of the insured's conduct, but of the wrongdoing of the slayer. The same distinction is made in *Murray vs. Insurance Co.*, 96 N. Y. 614, 48 Am. Rep. 658.

It follows that notwithstanding Moseley had previously shot Burns, if, upon so shooting, Moseley ran, abandoned the difficulty, was trying to get away, and the shot by Burns was in the course of a pursuit made only for the purpose of avenging himself upon Moseley, defendant would be liable. The killing of Moseley under such circumstances would not be the direct and proximate result of his misconduct. In such contingency something intervened between the situation in which Moseley's conduct might have been said to have resulted in his death, if he had then been killed, and the situation in which, fleeing for his life, his death resulted from Burns's unlawful purpose to kill. It cannot, we think, properly be said to be matter of reasonable and natural expectation that a police officer, if shot from behind his back by one whom he, as such officer, had just driven or ordered away from certain premises, would pursue his previous assailant, no longer such, but bent only on saving his life and avoiding further collision, and would follow the fugitive at least six hundred feet, not with the design of arresting him, but solely and purely with the design of killing him then and there, by way of revenge.

[6] It is true that the theory of a continued cross-fire and running fight between Burns and Moseley, following the latter's shot at the boiler shop, was not submitted. But in view of the not unnatural implication from Burns's testimony that

Moseley did not attempt to keep up the fight after the first shot fired at the boiler shop, until at least after he had been pursued by Burns for at least six hundred feet (when Burns says Moseley dropped behind the car and fired again), it was incumbent upon defendant, if it relied upon the defense that Burns's shot was delivered in the course of a running fight or actually in self-defense, to have presented a request embodying that theory. This was not done, and so the situation presented by such theory is not necessarily before us. The rule given by the trial court, confined as it was to the theory stated, is, in our opinion, amply supported by the authorities cited.

We find no error in the charge or in the action of the court in overruling defendant's motion for an instructed verdict.

The judgment of the district court is therefore affirmed, with costs.



UNITED STATES CIRCUIT COURT OF APPEALS.

EIGHTH CIRCUIT.

McKINNEY

vs.

GENERAL ACCIDENT, FIRE & LIFE ASSUR. CO., LTD.
(No. 3,979.)*

1. INSURANCE—ACCIDENT INSURANCE—RIGHT OF RECOVERY—BURDEN OF PROOF.

Under a policy whereby the insurance company contracts that if death shall result to the insured from bodily injuries caused by an accident alone within ninety days from the date of the injuries it will pay on account thereof, \$5,000 in addition to specified weekly indemnity, and that if such injuries shall "immediately, wholly and continuously disable and prevent the insured from performing any and every kind of duty pertaining to his occupation, and during the period of such continuous disability and within two hundred weeks from the date of the accident, result" in the death of the insured, the company will pay \$5,000, it is indispensable to a recovery for a death occurring more than ninety days after the date of the bodily injuries caused by the accident that they should have immediately, wholly, and continuously disabled and prevented the insured from performing any of the duties of his occupation.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.)

(Accident insurance—risk and causes of loss, see notes to National Acc. Society of City of New York vs. Dolph, 38 C. C. A. 3; New Amsterdam Casualty Co. vs. Shields, 85 C. C. A. 126.)

* Decision rendered, March 7, 1914. 211 Fed. Rep. 951. Syllabus by the Court.

2. INSURANCE—ACTION ON POLICY—CONSTRUCTION.

Where the terms of a contract are unambiguous and their meaning is plain, they must be held to mean what they clearly express, and no room is left for construction.

(For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.)

In Error to the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Action by Susie C. McKinney against the General Accident, Fire & Life Assurance Company, Limited. Judgment for defendant, and plaintiff brings error. Affirmed.

Before Sanborn and Smith, C. JJ., and Pope, D. J.

C. M. Williams, of Hutchinson, Kan., for Plaintiff in Error.

J. C. Rosenberger and Kersey Coates Reed, both of Kansas City, Mo., for Defendant in Error.

SANBORN, C. J.

This case presents a single question. Is pleading and proof that the accidental bodily injuries, which caused the death of the insured, immediately, wholly, and continuously disabled him from performing the duties pertaining to his occupation, indispensable to a recovery by the beneficiary on account of such a death which occurred more than ninety days after the infliction of the injuries under a policy of accident insurance whereby the maker agrees to pay for death caused by accidental bodily injuries on these conditions:—

"If any one of the disabilities enumerated below" (the first of which was death) "shall result from such injuries alone, within ninety days from the date of the accident, the corporation will pay the sum specified opposite such disability, under section 'B'" (which sum was \$5,000), "and in addition to weekly indemnity as provided in part 2, from the date of the accident to the date of death, dismemberment or loss of sight; or, if such injuries shall, independently and exclusively of all other causes, immediately, wholly and continuously disable and prevent the insured from performing any and every kind of duty pertaining to his occupation, and during the period of such continuous disability and within two hundred weeks from the date of the accident, shall result in any one of the disabilities enumerated below" (the first of which was death), "the corporation will pay the sum specified opposite such disability under section 'B'" (which sum was \$5,000), "and in addition, weekly indemnity as provided in part 2 to the date of the death, dismemberment or loss of sight."

The court below answered this question in the affirmative and sustained a demurrer to a complaint for a recovery for the death of an insured which disclosed the facts that his accidental injuries occurred on September 25, 1909, that they did not disable

him from performing the duties of his occupation until March 15, 1910, and that he did not die until May 21, 1911.

[1] Counsel specifies this ruling as error, argues that the condition that "if such injuries shall immediately, wholly and continuously disable" the insured found in the second part of the paragraph quoted does not limit the right of recovery for his death after the ninety days, but applies to the weekly indemnity only, because, as he contends, there is strong reason for conditioning the right to recover the weekly indemnity by immediate and continuous disability and none for thus limiting the beneficiary's right to recover for the death of the insured, and he cites in support of his argument *Rorick vs. Railway Officials' & Employees' Ass'n*, 119 Fed. 63, 55 C. C. A. 369; *Aetna Life Ins. Co. vs. Bethel*, 140 K. 609, 131 S. W. 523, 526; and *Continental Casualty Co. vs. Colvin*, 77 Kan. 561, 95 Pac. 565. The opinions in these cases have been read and considered, but they are neither authoritative nor persuasive upon the question in this case, because none of the contracts in either of the cases cited contain the clear and conclusive agreement which has been recited. There is a sound reason for limiting the accidental deaths occurring more than ninety days after the accidents for which an insurance company agrees to become liable to those caused by accidents which are followed by immediate, complete and continuous disability. The proportion of deaths that are caused by accidents independently of all other causes is small. All die, but most deaths are caused by disease or by causes other than accidents. It is not difficult to prove by the mistaken opinions of witnesses that a death which occurs more than ninety days after an accident which was not followed by immediate and continuous disability was caused by that accident independently of all other causes, even when the truth is that it was caused by disease alone, or by disease and the accident. It was undoubtedly to guard itself against recoveries for such deaths and to restrict its liability, as it had the moral and legal right to do, to the liability for deaths occurring more than ninety days after the accidents to those in which the immediate, complete, and continuous disability of the victims after the accidents presented physical evidence that the accidents were the cause thereof, that the company, while it contracted without condition to pay \$5,000 for the accidental death of the insured occurring within ninety days after the accident, limited its liability to pay for his accidental death occurring more than ninety days after the accident and within two hundred weeks thereof by the express condition that the injuries caused by the accident should immediately, wholly, and continuously, until his death, disable him from performing any duty pertaining to his occupation.

[2] A consideration of the reason for this provision of the policy and of the general rules for the construction of con-

tracts, however, while persuasive, is not controlling in the case in hand, for the terms of the policy are free from ambiguity or uncertainty, and this case falls under the familiar rule that, where the terms of a contract are unambiguous and plain, they must be held to mean what they clearly express, and no room is left for construction. *Imperial Fire Ins. Co. vs. Coos County*, 151 U. S. 452, 463, 14 Sup. Ct. 379, 38 L. Ed. 231; *Liverpool & London & Globe Ins. Co. vs. Kearney*, 94 Fed. 314, 319, 36 C. C. A. 265; *Delaware Ins. Co. vs. Greer*, 120 Fed. 916, 921, 57 C. C. A. 188, 61 L. R. A. 137.

Stripped of some of its verbiage, the plain and certain contract of this insurance company by its policy was to pay to the plaintiff, the beneficiary named therein, \$5,000 on account of the death of the insured occurring within ninety days after the accident which alone caused it, and to pay her \$5,000 on account of his death occurring more than ninety days and within two hundred weeks after the accident which alone caused it, if the bodily injuries inflicted by that accident immediately, wholly, and continuously disabled and prevented him from performing any and every duty pertaining to his occupation. The plaintiff admits by her complaint that the death of the insured did not occur within ninety days after the accident which caused it and that the bodily injuries caused by that accident did not immediately, wholly, or continuously thereafter disable or prevent him from performing for several months duties pertaining to his occupation. The death of the insured was not, therefore, one of those on account of which the insurance company agreed to make a payment to the beneficiary, and the judgment below must be affirmed.

It is so ordered,

SUPREME COURT OF NEW YORK.
APPELLATE DIVISION. FIRST DEPARTMENT.

CASUALTY CO. OF AMERICA

vs.

UNITED STATES CASUALTY CO.*

1. INSURANCE—REINSURANCE—ACTIONS UPON CONTRACTS
OF REINSURANCE—EVIDENCE.

In an action upon a reinsurance contract, evidence held not to sustain a finding that a clause exempting the reinsurer from liability for ac-

* Decision rendered, April 3, 1914. 146 N. Y. Supp. 957.

cidental injuries occurring to the insured while on a trip to Alaska was omitted from the reinsurance contract by mistake.

(For other cases, see Insurance, Cent. Dig. § 1823; Dec. Dig. § 686.)

2. INSURANCE — REINSURANCE — CONTRACT — CONSTRUCTION.

An insurance company insured the insured against accidental injuries from 1904 to 1909, but each year issued a new policy based upon a new application. A reinsurance company issued separate contracts of reinsurance for each of the policies issued; such contracts being based upon the policy and application for that particular year. *Held*, that each policy was a new, separate, and independent contract, and likewise each reinsurance contract constituted also a new contract to be read with the application and policy for that year.

(For other cases, see Insurance, Cent. Dig. §§ 1811, 1812, 1818, 1819; Dec. Dig. § 679.)

Appeal from Special Term, New York County.

Action by the Casualty Company of America against the United States Casualty Company. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before Ingraham, P. J., and Clarke, Scott, Dowling, and Hotchkiss, JJ.

Theodore H. Lord, of New York City, for Appellant.

Abraham L. Gutman, of New York City, for Respondent.

Scorr, J.

One Henry G. Elliott was insured by the plaintiff from May, 1904, until December, 1909, the date of his death, against accidental injuries and death by accident. He held successive policies of insurance each being issued for the term of one year. In 1905 and 1908 the outstanding policy was extended for one year by certificate. In 1904, 1906, 1907, and 1908 new policies were issued upon new applications. Defendant by contract with plaintiff reinsured the risk each year to the extent of one-half thereof. In December, 1909, Elliott was accidentally killed while on a visit to Alaska, and plaintiff paid the amount for which he was insured in compliance with the terms of its outstanding policy and now calls upon defendant for contribution in accordance with the terms of its reinsurance contract. Defendant by way of counterclaim asks that its contract of reinsurance be reformed by inserting a clause therein relieving the defendant from liability in case the said Elliott should sustain accidental injuries, fatal or nonfatal, or suffer disease or illness while outside of the limits of Canada, Europe, and the United States; the territory of Alaska not to be included as a part of the United States. It is alleged, and the court at special term has so found, that it was the intention of both parties to the reinsurance contract outstanding at the time of Elliott's death that this clause should be inserted therein, and that its omission was due to mutual mistake.

[1] The basic facts are undisputed, and are proven by written evidence; the only controversy being as to the deductions to be drawn from them.

It appears that separate contracts of reinsurance were executed whenever new policies were issued or old policies extended by plaintiff. In each instance when plaintiff issued a new policy upon a new application, copies of the application and the policy were furnished to defendant and constituted the basis upon which its contract of reinsurance was made.

In 1914 it appeared from Elliott's application for insurance that he contemplated a trip to Alaska, and defendant, noticing this, declined to reinsure the risk unless it should be exempted from liability in case of death or injury in Alaska. Plaintiff, having an agreement with Elliott that its policy should not be effective while the insured was in Alaska, undertook in writing that if defendant should reinsure the risk it should not be bound thereon outside the limits of the United States, Canada, and Europe; Alaska not included. Upon this undertaking, defendant reinsured the risk assumed by plaintiff by its policy of 1904. The next application made by Elliott was in 1906, and neither in this application, nor in those made by him in 1907 or 1908, was there any statement that he contemplated a visit to Alaska. On the contrary, in each of those applications he stated in effect that he did not contemplate any special journey or hazardous undertaking. It is doubtless owing to this fact that no special agreement excluding injuries or death while in Alaska was made between Elliott and the plaintiff nor between plaintiff and defendant. Upon these facts the court at special term arrived at the conclusion that it was the intention of the parties that the clause exempting defendant from liability in case of death or accident in Alaska should be inserted in each of the successive contracts of reinsurance and that its omission was due to a mutual mistake. This conclusion was arrived at by considering each successive contract of reinsurance as a mere continuation of the first contract of reinsurance issued in 1904 and subject to the express qualifications attached to that contract.

[2] We are unable to agree either with the conclusions or with the grounds upon which it was arrived at. In our view each policy issued by plaintiff, at least each of those issued in 1904, 1906, 1907, and 1908, was a new, separate, and independent contract, based upon a new application which constituted a part of the contract of insurance. In the same way each contract of reinsurance executed by defendant, at least in the years mentioned, constituted a new, separate, and independent contract based upon, and to be read in connection with, the application made to plaintiff in the particular year and the new policy issued by it upon such application. The mere fact that in its letter inviting reinsurance

in each year plaintiff referred to the proposed contract as a "renewal" of a former contract did not serve to so link the successive contracts together as to attach to each the special exemption from liability agreed to when the first contract for reinsurance was executed. There was a very special reason in 1904 why the defendant should insist upon and receive an exemption from liability in case of death or accident in Alaska, to wit, the declared intention of the insured to make a visit to Alaska. That reason did not exist in any of the subsequent years, and we find it impossible to believe that either plaintiff or defendant intended in 1908 to include in the reinsurance contract a proviso against liability which neither had reason to anticipate. The truth undoubtedly is that both plaintiff and defendant were misled by Elliott's declaration that he contemplated no special journey and for this reason omitted to safeguard themselves against a loss resulting from a visit to Alaska.

The result that the judgment appealed from must be reversed, with costs, and the counterclaim of defendants dismissed. It is obvious that the basic facts cannot be changed upon a new trial, and we do not understand that defendant contests its liability if the reinsurance contract be not reformed. Judgment will therefore be given for plaintiff, with costs.

The appropriate modification and reversal of the findings of fact, and the new findings to be made, will be passed upon on the settlement of the order. All concur.



GROGAN vs. TRAVELERS INS. CO. OF HARTFORD, CONN.*

(Court of Appeals of Colorado.)

1. INSURANCE — ACCIDENT INSURANCE — RENEWAL OF POLICY—REFUSAL.

A letter written by insured to a soliciting agent, who had, without insured's request, paid a renewal premium for him, stating that he was sorry to have been of so much trouble, and would return the renewal receipt, and was sorry that the agent advanced the amount of the policy, as "I did not intend to renew it this year," and hence was not sending the amount due on the policy, since its lapse, as requested, was a refusal to renew the policy, preventing his beneficiary from thereafter recovering for his death.

(For other cases, see Insurance, Cent. Dig. §§ 276-291; Dec. Dig. § 145.

* Decision rendered, Feb. 11, 1914. Rehearing denied, April 13, 1914. 139 Pac. Rep. 1045.

2. INSURANCE — ACCIDENT INSURANCE — RENEWAL — ACCEPTANCE.

Insured, by receiving a renewal receipt and letters of the soliciting agent asking him to renew the policy, and holding them until he was notified that the agent had advanced the premiums and attempted to renew it for insured, did not assent to the acceptance of a renewal policy, but, rather, declined it.

(For other cases, see Insurance, Cent. Dig. §§ 276-291; Dec. Dig. § 145.)

3. CONTRACTS—ASSENT—NECESSITY.

There must be a mutual assent of the parties to constitute a binding contract.

(For other cases, see Contracts, Cent. Dig. §§ 61-66; Dec. Dig. § 15.)

4. INSURANCE — ACCIDENT INSURANCE — ACTIONS — SUFFICIENCY OF EVIDENCE.

Evidence, in an action on an accident policy, held not to show a valid renewal by insured, but merely an attempt by the soliciting agent to renew the policy by herself paying the premiums without insured's consent.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

Morgan, J., dissenting.

Error to District Court, Denver County; Greeley W. Whitford, Judge.

Action by Alice S. Grogan against the Travelers Insurance Company of Hartford, Connecticut. Judgment for defendant, and plaintiff brings error. Affirmed.

Toney & Toney, George S. Redd, and Bert Martin, all of Denver, for Plaintiff in Error.

Goudy & Twitchell and J. H. Burkhardt, all of Denver, for Defendant in Error.



MUTUAL TRUST & DEPOSIT CO. vs. TRAVELERS' PROTECTIVE ASS'N OF AMERICA. (No. 7,760.)*

(Appellate Court of Indiana.)

1. INSURANCE—LIFE INSURANCE—PROOFS OF DEATH—WAIVER.

The rejection of the proofs of death after the time within which they are required does not show a waiver on the part of the insurer of the right to demand proofs of death.

(For other cases, see Insurance, Cent. Dig. §§ 1963-1965; Dec. Dig. § 789.)

2. APPEAL AND ERROR—MUTUAL BENEFIT INSURANCE—ACTIONS—COMPLAINT.

Where, in an action on a benefit certificate, one paragraph of the complaint alleged that the insured and plaintiff duly performed all the

* Decision rendered, April 9, 1914. 104 N. E. Rep. 880.

conditions on their part, and duly notified defendant of the death of insured, and made proof thereof, as required by the regulations of the insurer, and that payment of the amount due was refused and liability denied by defendant, it was not error to strike out another paragraph, which alleged that such notices and proof were received and accepted, without objection, by defendant at its principal office, and retained until a subsequent day, when the proofs were rejected, and payment of the claim refused, and that defendant's agent, after having ascertained the circumstances of insured's death, denied liability; and all the allegations stricken out being susceptible of proof under the paragraph remaining.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.)

3. INSURANCE—LIFE INSURANCE—PROOFS OF DEATH—WAIVER.

Where a claim on a benefit certificate was rejected on the ground that insured committed suicide, there was a waiver of defects in the proofs of death.

(For other cases, see Insurance, Cent. Dig. §§ 1963-1965; Dec. Dig. § 789.)

4. TRIAL—VERDICT—SPECIAL INTERROGATORIES.

In passing on a motion for judgment on the answers to interrogatories notwithstanding the general verdict, the court can only consider the issues made by the pleadings, the general verdict, the interrogatories, and the answers thereto.

(For other cases, see Trial, Cent. Dig. §§ 857-860, 875, 878; Dec. Dig. § 359.)

5. TRIAL—VERDICT—PRESUMPTION.

Every presumption is indulged in favor of the general verdict, and the answers to special interrogatories will not be held in irreconcilable conflict, if they may be harmonized and made consistent with it by any evidence possible under the issues.

(For other cases, see Trial, Cent. Dig. §§ 857-860, 875, 878; Dec. Dig. § 359.)

6. TRIAL—VERDICT—SETTING ASIDE.

Where the answers to special interrogatories are inconsistent or contradictory, they nullify each other, and do not affect the general verdict.

(For other cases, see Trial, Cent. Dig. § 856; Dec. Dig. § 358.)

7. INSURANCE—ACTIONS—DEFENSES.

If a loss is within a warranty or exception in a benefit certificate, it must be pleaded affirmatively by defendant, and is not available under a general denial, unless the complaint contains averments putting such matters in issue.

(For other cases, see Insurance, Cent. Dig. §§ 1996-1998; Dec. Dig. § 815.)

8. INSURANCE—ACTIONS—MATTERS IN ISSUE.

In an action on a benefit certificate, where the complaint alleged that death was the result of an accident causing visible marks, and a copy of the by-laws was attached, declaring that the insurer should not be liable, unless the injury produced a visible mark on the body, a general denial put in issue the question whether there were such

visible marks on the body, even though the allegations as to visible marks were unnecessary.

(For other cases, see Insurance, Cent. Dig. §§ 1996-1998; Dec. Dig. § 815.)

9. INSURANCE—ACCIDENT INSURANCE—DEFENSES.

Where a benefit certificate provided that there could be no recovery, unless the accident causing death should leave a visible mark on the body, the insurer is liable where the injury caused visible marks on the body, even though they were later obliterated, and did not appear after death.

(For other cases, see Insurance, Cent. Dig. §§ 1955, 1957-1959; Dec. Dig. § 787.)

10. INSURANCE—GENERAL VERDICT—SPECIAL INTERROGATORIES.

In an action on a benefit certificate, providing that the insurer should not be liable, unless the injury causing death produced visible marks on the body, there was a general verdict for the beneficiary, and the jury, in their answers to special interrogatories, declared that insured died by reason of a dislocated neck, but that, at the time of his death and after his death, there was no visible mark of injury on his body. *Held* that, as the mark caused by the dislocation might have been obliterated at the time of insured's death or thereafter, the answers to the special interrogatories were not so inconsistent with the general verdict as to warrant a judgment for defendant notwithstanding the verdict.

(For other cases, see Insurance, Cent. Dig. § 2011; Dec. Dig. § 827.)

11. INSURANCE—ACCIDENT INSURANCE—PROVISIONS—CONSTRUCTION—"VISIBLE."

A provision in a benefit certificate that the insurer shall not be liable, unless the injury produces a visible mark on the body, the body itself not being deemed such a mark in case of death, will be most strongly construed against the insurer, and it cannot escape liability where insured met his death in a violent accident, the results of which are discoverable by examination; the term "visible" being used in the broad sense of perceptible, discernible, clear, distinct, and evident.

(For other cases, see Insurance, Cent. Dig. §§ 1955, 1957-1959; Dec. Dig. § 787.)

(For other definitions, see Words and Phrases, vol. 8 p. 7329.)

12. EVIDENCE—JUDICIAL NOTICE.

The court cannot take judicial notice that the dislocation of a neck, from which death results, will cause a visible mark on the body following the injury, within a provision exempting the insurer from liability in case there is no such mark.

(For other cases, see Evidence, Cent. Dig. § 19; Dec. Dig. § 14.)

Shea, P. J., dissenting.

On motion for rehearing. Rehearing granted, and former opinion overruled, and judgment reversed.

For former opinion, see 100 N. E. 451.

STATE *vs.* CONTINENTAL CASUALTY CO.*
(Supreme Court of Louisiana.)

1. INSURANCE—LICENSE TAX.

Act No. 50 of 1902 provides certain conditions "to form insurance companies * * * for any of the following purposes," and then goes on to enumerate the various kinds of insurance that belong to the eleven groups designated by the act. In the fifth group is included insurance "against sickness, bodily injury or death by accident," and therefore any company carrying on the business of insuring against all of these contingencies is carrying on but a single business, and need pay but a single license tax.

(For other cases, see Insurance, Cent. Dig. § 6; Dec. Dig. § 7.)

2. INSURANCE—LICENSE TAX.

That clause in section 9 of Act No. 171 of 1898 providing that "any other insurance not otherwise provided for" in that act shall be subject to a tax can have no application to the insurance "against sickness, bodily injury, or death by accident," because such insurance is otherwise provided for by Act No. 50 of 1902.

(For other cases, see Insurance, Cent. Dig. § 6; Dec. Dig. § 7.)

3. LICENSE TAX—INSURANCE.

The decision in the case of the State *vs.* Maryland Casualty Co., 133 La. 146, 62 South. 606, is not decisive of the present case, and is not authority for subjecting defendant to two licenses, because in the cited case the defendant admitted that it owed two license taxes, and therefore judgment was naturally rendered against it for both of them.

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by the State against the Continental Casualty Company, for an additional license. From a judgment for plaintiff, defendant appeals. Reversed and dismissed.

Gustave Lemle, of New Orleans (Manton Maverick and M. P. Cornelius, both of Chicago, Ill., of counsel), for Appellant.

W. W. Westerfield, of New Orleans, for Appellee.

* Decision rendered, Feb. 16, 1914. Rehearing denied, March 16, 1914.
64 South. Rep. Syllabus by the Court.

BEANE vs. CONTINENTAL CASUALTY CO. (No. 16,540.)*

(Supreme Court of Mississippi.)

1. INSURANCE—ACCIDENT INSURANCE—CONSTRUCTION OF CONTRACT—CHANGE OF OCCUPATION.

An accident insurance policy provided that, if insured was killed or injured after having changed to a more hazardous occupation, the liability should be only for such portion of the indemnity as the premium paid would purchase at the rate for the more hazardous occupation. The insurer's manual classified the occupation of freight brakeman as more hazardous than that of freight conductor, and provided that in case of more than one occupation that of the greatest hazard would determine the classification. Deceased, who gave his occupation as a freight conductor, afterwards changed to a freight brakeman, or freight extra conductor and brakeman, and after returning from a trip as freight brakeman was accidentally killed while off duty. *Held*, that the beneficiary was entitled only to the indemnity which the premium paid would purchase for the more hazardous occupation, and that the fact that he was killed while off duty was immaterial in determining the amount of indemnity.

(For other cases, see Insurance, Cent. Dig. §§ 1309, 1316, 1317; Dec. Dig. § 530.)

2. INSURANCE—ACCIDENT INSURANCE—CONSTRUCTION OF CONTRACT.

A provision in an accident insurance policy for a smaller indemnity in case the insured is injured while engaged in an occupation more hazardous than that specified in his application is reasonable, and will be enforced by the courts; the provision being regarded as a special contract, contemplating a future change of occupation.

(For other cases, see Insurance, Cent. Dig. §§ 1309, 1316, 1317; Dec. Dig. § 530.)

Appeal from Circuit Court, Bolivar County; Sam C. Cook, Judge. Action by Mrs. Anna L. Beane against the Continental Casualty Company. From the judgment, plaintiff appeals. Affirmed.

Sillers, Owen & Sillers, of Rosedale, for Appellant.
G. Q. Whitfield, of Jackson, and M. P. Cornelius, of Chicago, Ill., for Appellee.

* Decision rendered, March 23, 1914. 64 South. Rep. 732.

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REDDICK vs. NORTHERN ACCIDENT CO. ET AL.*

(Springfield Court of Appeals. Missouri.)

1. INSURANCE—CONTRACTS—CONSTRUCTION—"WAGES."

An accident and health policy made assured's statements in the applica-

* Decision rendered, March 28, 1914. 165 S. W. Rep. 354.

tion a part thereof, and provided that the monthly indemnity should not exceed the money value of assured's time. Assured stated in the application that his monthly "wages" were \$70 a month, while at the time he received for services as clerk only \$40. He was receiving at the time \$30 a month from a farm he owned. *Held*, that assured, sustaining a personal injury, was entitled only to recover an amount based on an earning capacity of \$40 a month, since "wages," which is compensation given to a hired person for his services, does not include income.

(For other cases, see Insurance, Cent. Dig. §§ 1309, 1316, 1317; Dec. Dig. § 530.)

(For other definitions, see Words and Phrases, vol. 8, pp. 7369-7373, 7831.)

2. INSURANCE—ACCIDENT INSURANCE—DEFENSES—BURDEN OF PROOF.

An insurer, seeking to escape liability on an accident policy providing for monthly indemnity for loss of time resulting from bodily injuries, on the ground that assured sustained an injury while under the influence of intoxicating liquor, or in consequence thereof, has the burden of proving the defense.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. § 646.)

3. APPEAL AND ERROR—HARMLESS ERROR—ERRONEOUS RULINGS ON PLEADING.

The error, if any, in permitting plaintiff to file a reply out of time will not be considered, where the reply was unproven.

(For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.)

Appeal from Circuit Court, Greene County; Guy D. Kirby, Judge.

Action by Samuel Reddick against the Northern Accident Company and another. From a judgment for plaintiff, defendants appeal. Conditionally affirmed.

Williams & Galt, of Springfield, for Appellants.
A. B. Lovan, of Springfield, for Respondent.



HACKLER vs. INTERNATIONAL TRAVELERS' ASS'N.*

(Court of Civil Appeals of Texas. Texarkana.)

1. TRIAL—QUESTION FOR COURT.

In an action on an accident policy, where the question for determination was whether an amendment to a by-law set up as a defense was duly adopted, and the evidence as to the adoption was without dispute, the court should decide the question as a matter of law.

(For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.)

* Decision rendered, March 12, 1914. 165 S. W. Rep. 44.

2. INSURANCE—MUTUAL ACCIDENT ASSOCIATION—AMENDMENT TO BY-LAWS.

A notice sent by a mutual assessment accident association, informing the members that proposed amendments to the by-laws would be acted on at the regular monthly meeting of the directors, Saturday, December 9th, is not sufficient under Rev. St. 1911, art. 4800, declaring that before the adoption of any by-laws or amendments, the same must be mailed to all members of the association, together with a notice of the time and place when they would be considered, for the notice did not inform the members of the hour of the meeting, or where it would be held, and the directors, unless otherwise prevented by the by-laws, have the power to select the place of meeting.

(For other cases, see Insurance, Cent. Dig. § 66; Dec. Dig. § 54.)

3. CORPORATIONS—DIRECTORS—POWERS.

Unless the by-laws otherwise prescribe, the directors of a corporation may select the place of meeting, and they are not bound to meet at the principal place of business of the corporation.

(For other cases, see Corporations, Cent. Dig. §§ 1192, 1205, 1206; Dec. Dig. § 298.)

4. INSURANCE—MUTUAL ACCIDENT ASSOCIATION—BY-LAWS—AMENDMENTS.

Where the notice that proposed amendments to the by-laws of a mutual assessment accident association would be considered at the next regular meeting of the directors did not specify the place of meeting, that a member, who claimed that the notice was insufficient under the statute to render the adoption of the amendments of any effect against him, knew the location of the main office of the association, at which place the meeting was actually held, is immaterial, and cannot validate the defective notice.

(For other cases, see Insurance, Cent. Dig. § 66; Dec. Dig. § 54.)

Appeal from Dallas County Court; W. F. Whitehurst, Judge.

Action by George Henry Hackler against the International Travelers' Association. From a judgment for defendant, plaintiff, appeals. Reversed and rendered.

Wood & Wood, of Dallas, for Appellant.
Seay & Seay, of Dallas, for Appellee.

CASUALTY, SURETY AND MISCELLANEOUS.**UNITED STATES CIRCUIT COURT OF APPEALS.**

SEVENTH CIRCUIT.

AMERICAN CEREAL CO.

vs.

LONDON GUARANTEE & ACCIDENT CO. (No. 2,029.)*

1. INSURANCE—LIABILITY INSURANCE—LIABILITIES COVERED—“CONTINGENT LIABILITY.”

Under a contract to indemnify plaintiff against loss arising solely from its contingent liability as owner for injuries to any person during the construction of a building, resulting from the negligence of any contractor or subcontractor, and containing an agreement that the work was to be done by contract at the risk of the contractor or subcontractors and that assured had not and would not voluntarily assume any liability for loss on account of injuries by reason of the negligence of any contractor or subcontractor, the insurer was liable only for injuries for which plaintiff was contingently liable as owner, and not for injuries for which he was directly liable as doer or cause of the negligent act, since a “contingent liability” is one depending upon an uncertain event (citing *Words and Phrases*, vol. 2, p. 1501).

(For other cases, see *Insurance*, Cent. Dig. § 1144; Dec. Dig. § 435.)**2. INSURANCE—ACTIONS—DECLARATION—LOSS AND CAUSE THEREOF.**

In an action on a contract indemnifying the owner of a building from loss arising solely from its contingent liability as owner for injuries caused by the negligence of any contractor or subcontractor, a declaration, alleging that O. suffered injuries by reason of the construction of such building from which he thereafter died, and that his administrator had sued such owner and others for damages for causing his death, failed to show that the owner was “contingently liable” for the injuries, since they might have been due to the fault of himself or of others for whose negligence he was not answerable as owner.

(For other cases, see *Insurance*, Cent. Dig. §§ 1575-1580, 1584-1586, 1592, 1598; Dec. Dig. § 629.)**3. INSURANCE—ACTIONS—DECLARATION—LOSS AND CAUSE THEREOF.**

In an action on a contract to indemnify plaintiff against loss arising from its contingent liability as owner of a building for injuries due to the negligence of any contractor or subcontractor, a declaration, alleging injuries caused by the construction of such building, for which insured and others were sued, without showing that insured was contingently liable therefor, and further alleging that the insurer assumed the obligation to defend the action and conducted the defense until after the trial thereof before a jury, that after

* Decision rendered, Jan. 6, 1914. 211 Fed. Rep. 96.

the trial the insurer so carelessly and negligently conducted the defense as to cause the defendants other than insured to be discharged and relieved, and that after the trial the insurer abandoned the defense of the action and refused to defend it further, failed to show facts estopping the insurer from relying on its non-liability under the policy, except for injuries for which insured was contingently liable; since, if insured and others were directly liable, there being no contribution or recovery over among the joint tortfeasors, the dismissal of such other defendants did not injure insured, and, it not being alleged that a verdict was returned or judgment entered against insured, it was not a violent supposition that the submission of the case was set aside and that insured came into charge of the defense *de novo*, and hence it did not appear that it was misled or injured by the insurer undertaking the defense of the action.

(For other cases, see *Insurance*, Cent. Dig. §§ 1575-1580, 1584-1586, 1592, 1598; Dec. Dig. § 629.)

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois; Geo. A. Carpenter, Judge. Action by the American Cereal Company against the London Guarantee & Accident Company. Judgment for defendant on demurrer, and plaintiff brings error. Affirmed.

Before Baker, Seaman, and Kohlsaat, C. JJ.

Jones, Addington, Ames & Seibold, of Chicago, Ill. (Keene H. Addington and Walter Hamilton, both of Chicago, Ill., of counsel), for Plaintiff in Error.

Robert J. Folonie, of Chicago, Ill. (F. J. Canty, of Chicago, Ill., of counsel), for Defendant in Error.

BAKER, C. J.

Plaintiff in error filed a declaration in three counts against defendant to recover on an indemnity contract. A demurrer to each count was sustained, plaintiff declined to plead further, and the judgment to which this writ of error is addressed was thereupon entered.

[1] In the third count the contract is set out in *haec verba*. For the sum of \$50 defendant agreed to indemnify plaintiff for one year "against loss arising solely from its contingent liability as general contractor or owner from common law or any statute for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered by any person or persons during the construction of the building described in the schedule hereinafter given, and resulting from the negligence of any contractor or subcontractor engaged in the construction of said building, subject to the following special and general agreements, which are to be construed as co-ordinate, as conditions."

The schedule showed that plaintiff was the owner of the building.

Special agreement B reads:—

"If the assured is the owner of the building mentioned in the schedule, it is agreed that all the work of constructing the same

is to be done by contract at the risk of the contractor or subcontractors and that the assured has not and will not by contract or otherwise voluntarily assume any liability for loss on account of bodily injuries suffered by any person or persons by reason of the negligence of any contractor or subcontractor."

General agreement 2 is as follows:—

"If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the head office of the company for the United States of America every summons or other process as soon as the same shall have been served on him, and the company will at its own cost defend against such proceedings in the name and on behalf of the assured, or settle the same, unless it shall elect to pay to the assured the indemnity provided for in clause A of the special agreements as limited therein."

From the explicit terms of this contract it is clear that there could be no obligation on the part of defendant to indemnify plaintiff unless during the construction of the building by an independent contractor some one accidentally suffered bodily injury through the negligence of the contractor or a subcontractor, for which negligence plaintiff was nowise directly liable as doer or causer of the negligent act, but only "contingently" liable as owner of the building. Compare *London Guarantee Co. vs. Cereal Co.*, 251 Ill. 123, 95 N. E. 1064, where this very form of indemnity contract was under consideration. See, also, *Allen vs. Gilman, McNeil & Co.*, 145 Fed. 881, 76 C. C. A. 265, 7 L. R. A. (N. S.) 958; *Connolly vs. Bolster*, 187 Mass. 266, 72 N. E. 981; *Frye vs. Bath Gas & Electric Co.*, 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500; *Cushman vs. Carbondale*, 122 Iowa, 656, 98 N. W. 509; *Carter vs. Aetna Life Insurance Co.*, 76 Kan. 275, 91 Pac. 178, 11 L. R. A. (N. S.) 1155.

A "contingent" liability is one that depends upon an uncertain event, as the liability of an indorser to respond for the default of the maker. 2 Words and Phrases, 1501; *State ex rel. Breedon vs. Sheets*, 26 Utah, 105, 72 Pac. 334; *Rosenbloom vs. Travelers' Insurance Co.*, 38 Misc. Rep. 744, 78 N. Y. Supp. 1135. Plaintiff bargained to be saved from loss, not through its own negligence, but only through its contingent liability as owner of the building for negligent acts of the independent contractor or of those under him.

[2] Plaintiff's only allegations tending to show a "contingent liability" on its part were the following:—

"That during the month of November, 1899, and within the period covered by said contract of indemnity, one W. L. Overhouser, a resident of said city of Cedar Rapids, did accidentally suffer bodily injuries during and by reason of the construction of said buildings mentioned and described in said contract of in-

demnity ; that thereafter and during, to wit, the said month of November, 1899, said W. L. Overhouser died as the result of such injuries ; that thereafter one Henry Overhouser, as administrator of the estate of said W. L. Overhouser, did institute a certain action against the plaintiff and others for the purpose of recovering damages for causing, as alleged, the death of said W. L. Overhouser."

Plaintiff failed to charge that Overhouser was injured through the negligence of an independent contractor or a subcontractor under circumstances which would make plaintiff contingently liable as owner. For aught that appears, Overhouser may have been injured through the fault of himself or of others for whose negligence plaintiff as owner was not answerable over. There is an utter failure to bring the alleged breach within defendant's promise.

[3] Notwithstanding this failure to make out a case under the contract, plaintiff insists that subsequent allegations in this count preclude defendant from relying upon the terms of the contract. These allegations are:—

"That the defendant assumed the obligation to defend said action, took charge and control of the defense thereof, and conducted the same until after the trial thereof before a jury impaneled for that purpose ; and notwithstanding, although the plaintiff did fully, and at the time and times specified in said contract of indemnity, keep and perform all things in said contract of indemnity mentioned, on its part to be kept and performed, the defendant, after the trial of said cause, so carelessly, negligently, and improperly conducted the defense of said action as to cause the defendants to the same other than the plaintiff to be discharged and relieved therefrom, and did after the trial of said action abandon the defense of the same and notify the plaintiff that it would thereafter be required to defend the same upon its own account and at its own expense ; that the plaintiff protested against such action, but, notwithstanding such protest, the defendant refused further to defend said action or to assist in the defense thereof, and denied and disclaimed all liability of every kind and character under and by virtue of said contract of indemnity ; that the plaintiff did, by reason of the action of the defendant in so refusing further to defend said action, undertake the defense thereof, and in that behalf incurred and disbursed, to wit, the sum of one thousand dollars (\$1,000), and that the plaintiff did finally settle and compromise said action for, to wit, the sum of twenty-five hundred dollars (\$2,500), which said sum was a fair and reasonable amount to be paid in compromise and settlement of said action."

But there is no estoppel unless plaintiff has been misled and injured. *Connolly vs. Bolster*, 187 Mass. 266, 72 N. E. 981 ; *Employers' Liability Assurance Corporation vs. Chicago & Big*

Muddy Hole Co., 141 Fed. 692, 73 C. C. A. 278; Empire Surety Co. vs. Pacific Nat. Lumber Co., 200 Fed. 224, 118 C. C. A. 410. If defendant, outside of its contract, assumed the defense of a personal injury case in which plaintiff "and others" were directly liable, the dismissal of the others could not injure or prejudice plaintiff, for there could be no contribution, or liability over, among the joint tort-feasors. If defendant's interposition in the Overhouser case prevented plaintiff from presenting fully its defense, or in any way prejudiced plaintiff in the final results of that case, a different question from the one before us would be presented. But defendant notified plaintiff "after the trial" that defendant would withdraw from the case, and thereupon plaintiff "undertook the defense." The pleader seems to have been very careful not to allege that "after the trial" a verdict was returned and a final judgment entered against plaintiff. If, in truth, "after the trial" the submission of the Overhouser case was set aside and plaintiff came into charge of the defense *de novo*, and if defendant had been misled into undertaking the defense by plaintiff's representation that the building was being erected by an independent contractor in accordance with the terms of the indemnity contract, when plaintiff was actually constructing the building itself, not only was there no injury suffered by plaintiff, but defendant was amply justified in withdrawing. The allegations of this count are no bar to believing that the foregoing supposititious circumstances may have been the actual circumstances. And that the supposition is not a violent one may be learned by consulting the facts in the case of London Guarantee Co. vs. Cereal Co., 251 Ill. 123, 95 N. E. 1064.

Though the first and second counts do not set out the indemnity contract in *hæc verba*, they rely upon an undertaking of defendant "to indemnify plaintiff against loss arising from the contingent liability of plaintiff for damages on account of bodily injury accidentally suffered by any person during the construction of the building." As the averments respecting the injury of Overhouser are the same as in the third count, there is a failure to show any "contingent liability" of plaintiff; and as the allegations respecting estoppel are also identical with those in the third count, defendant was at liberty to withdraw from the Overhouser case without creating a liability over and beyond its contractual liability.

The judgment is affirmed.

COURT OF APPEALS OF NEW YORK.**UTICA SANITARY MILK CO.****vs.****CASUALTY CO. OF AMERICA.*****INSURANCE—CASUALTY INSURANCE—NOTICE OF LOSS—
NOTICE TO AGENT—IMPUTATION TO INSURER.**

Where H. was the general agent of defendant casualty company, which had written casualty insurance for plaintiff corporation, of which H. was also a stockholder, director, treasurer, and general manager, his knowledge of the happening of an accident for which plaintiff would be liable within the policy was not imputable to defendant so as to relieve plaintiff from complying with a clause in the policy that the assured on the occurrence of a covered casualty should give immediate written notice thereof with the fullest information obtainable to the insurer's authorized local agent, or to its home office.

(For other cases, see Insurance, Cent. Dig. § 1327; Dec. Dig. § 538.)

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the Utica Sanitary Milk Company against the Casualty Company of America. From a judgment for plaintiff, modified and affirmed by the Appellate Division (152 App. Div. 898, 136 N. Y. Supp. 353), defendant appeals. Reversed, and new trial ordered.

The defendant, on or about March 24, 1910, issued to the plaintiff a policy of employers' liability insurance, whereby the defendant agreed to indemnify the plaintiff for twelve months thereafter from loss or liability arising from accident or injury to any of the plaintiff's employees up to a fixed amount. The policy contained the following provision: "The assured upon the occurrence of a casualty covered hereby shall give immediate written notice thereof, with the fullest information obtainable at the time, to the company's duly authorized local agent, or to its home office in New York City."

On or about July 16, 1910, an accident occurred to one of the plaintiff's employees named Clark, whereby he suffered a fracture of the leg, which was a casualty within the meaning of the policy. No written notice of the accident was given to the defendant until December 5, 1910. The insurance was effected through one Albert R. Hatfield, the general agent of the defendant for the city of Utica and vicinity, and it was a part of his duty to report to the defendant any accident which might result in a claim against the company. Hatfield was a stockholder and director of the plaintiff, and was also its treasurer and general manager. He had control over the plaintiff's business,

* Decision rendered, March 3, 1914. 104 N. E. Rep. 918.

which consisted of selling and delivering milk in Utica. The fact that Hatfield was the trustee and manager of the plaintiff was known to the defendant at the time of the accident and for some time prior thereto. Hatfield knew of the accident on the day it occurred, as did also the plaintiff's president. The court also found that the notice required by the policy was not given, because the plaintiff believed that no claim would be made by Clark on account of his injury. The plaintiff paid to the injured man his wages for the three months succeeding the accident when he did not work, and on August 26, 1910, took from him a written statement to the effect that the plaintiff was free from all liability on account of his injuries. Some time later Clark made a claim upon the plaintiff for damages, and Hatfield, on December 5, 1910, gave the defendant notice of the claim by mail. This was the first notice the defendant had of the accident. Subsequently Clark sued the plaintiff, and the defendant, the casualty company, refused to undertake the defense of the action, because it had not received notice of the accident in accordance with the provisions of the policy. The action resulted in a judgment against the milk company, the plaintiff here, and this suit was brought by it to recover from the defendant casualty company the amount of the judgment and the costs of defending the action. The court found that the condition of the policy requiring immediate notice to be given of any casualty covered thereby was not waived, but decided as matter of law that no such notice was required because Hatfield, the local agent of the defendant, had actual knowledge of the accident, and ordered judgment for the plaintiff.

Charles P. Ryan, of Syracuse, for Appellant.
James P. Ryan, of Utica, for Respondent.

CUDDEBACK, J. (after stating the facts as above).

The plaintiff rests its case on the proposition that the knowledge which Hatfield possessed was the knowledge of the defendant, and no further notice of the accident was required by the policy. The argument is that Hatfield was the plaintiff's manager, charged with the duty of giving notice, and that he was the defendant's agent, charged with the duty of receiving such notice, and that it would have been a useless formality for Hatfield to give notice to himself, and further that the defendant had knowledge of Hatfield's dual agency.

In *Exchange Bank vs. Nebraska Underwriters' Ins. Co.*, 84 Neb. 110, 120 N. W. 1010, 133 Am. St. Rep. 614, a somewhat analogous situation was presented. The assistant cashier of the plaintiff, who was also the agent of the defendant, issued policies of insurance upon certain property. The property was thereafter by bill of sale conveyed to the bank as security for a

loan and with it was transferred the policies of insurance. The defendant had no further information of the bill of sale than that possessed by its agent, the assistant cashier of the bank. Under the provisions of the policy a sale of the property insured made without the knowledge and consent of the defendant invalidated the insurance. In a suit brought by the bank against the insurance company it was held that the plaintiff could not recover. The court said: "We think it may be regarded as well established that where an agent's duty to his principal is opposed to, or even remotely conflicts with, his own interest, or the interest of another party for whom he acts, the law will not permit him to act, nor will it hold his acts or his knowledge gained in such transaction obligatory upon his principal."

The case in Nebraska was followed by the Supreme Court of North Dakota in First National Bank of Nome vs. German-American Ins. Co., 23 N. D. 139, 134 N. W. 873, 38 L. R. A. (N. S.) 213. In that case the agent of the defendant was also the cashier of the plaintiff—a fact known to the defendant. As agent of the defendant the cashier issued policies of insurance on the bank's property, and afterward obtained for the bank additional insurance upon the same property in another company. He gave no notice of the additional insurance to the defendant as its policies required. It was held, after a loss, that the insurance company was not liable to the bank upon the policies issued by the cashier as the defendant's agent.

The object of these provisions for immediate notice of a possible loss in an insurance policy is to give information to the insurance company in order that it may protect itself. The duty of furnishing such information rests on the insured. The primary duty of Hatfield in the present case was to take, in behalf of the plaintiff, the first step required by the policy after the accident occurred, and give the insurer notice thereof. Hatfield was in full control of the plaintiff's business. He acquired knowledge of the accident on the day it occurred while in the discharge of his duties, and it was then within the scope of his duty to give the insurer notice as provided for in the policy. He did not give the notice because the plaintiff believed that no claim would arise out of the accident. Some six weeks later he endeavored to settle the liability of the plaintiff to the injured employee, and took from him a statement that the milk company was not to blame for the accident. In all of this he was not acting in his capacity as an agent of the defendant, but in behalf of his own company, in which he was a stockholder and director, as well as treasurer and manager thereof.

But it is argued that Hatfield was also the agent of the defendant, the insurance company, and that it would have been a useless formality for him to give notice to himself. I regard that argument as unsound. The observance of formalities is

sometimes necessary to protect substantial rights. It may be that, if Hatfield had given notice of the accident to himself, he would have been aroused to a sense of his duty to his principal, the insurance company, and would have forwarded the notice to the home office of the company. At any rate, the result of his inaction as the plaintiff's agent left the defendant without the information to which it was entitled under the policy.

Upon the facts found, Hatfield's knowledge should not, in my opinion, be imputed to the defendant (*Atlantic State Bank of Brooklyn vs. Savery*, 82 N. Y. 291, 307), or be held ground for dispensing with the written notice which the policy required.

I recommend that the judgment appealed from be reversed, and a new trial ordered, with costs to abide the event.

Willard Bartlett, C. J., and Hiscock, Collin, Hogan, and Miller, JJ., concur. Werner, J., absent.

Judgment reversed, etc.



HANVEY *vs.* GEORGIA LIFE INS. CO.*

(Supreme Court of Georgia.)

INSURANCE—AUTOMOBILE INSURANCE—ACTION ON POLICY—PETITION—DEMURRER.

The petition in this case was not subject to general demurrer.

(For other cases, see Insurance, Cent. Dig. §§ 1544, 1630; Dec. Dig. § 642.)

Error from Superior Court, Richmond County; Henry C. Hammond, Judge.

Action by George Hanvey against the Georgia Life Insurance Company. A general demurrer to the petition was sustained, and plaintiff brings error. Reversed.

C. E. Dunbar, of Augusta, for Plaintiff in Error.
Archibald Blackshear, of Augusta, for Defendant in Error.

* Decision rendered, Feb. 23, 1914. 81 S. E. Rep 26. Syllabus by the Court.

HARTFORD FIRE INS. CO. vs. PIRES.*

(Court of Civil Appeals of Texas. Dallas.)

1. COSTS—ON APPEAL—RECOVERY OF MORE FAVORABLE JUDGMENT.

While Rev. St. 1911, art. 2046, provides that if the losing party appeals, and the judgment in the court above be against him, but for a less amount, such party shall recover his costs in the court above, yet, as article 2048 declares that the court may, for good cause, to be stated on the record, adjudge the costs otherwise, the county court could, on appeal from the justice court, adjudge all the costs to appellee, though the judgment rendered was less than that of the justice court, where the difference in amount was due to a miscalculation of interest by the justice, and the error was not called to his attention.

(For other cases, see Costs, Cent. Dig. §§ 847, 852, 853, 855, 872-875; Dec. Dig. § 231.)

2. INSURANCE—POLICY—CONSTRUCTION—PROPERTY COVERED BY INSURANCE AGAINST FIRE.

An insurance policy, indemnifying against loss of rents caused by fire or lightning, actually sustained on rented premises, for such period as may be reasonably necessary to restore the premises to the same tenantable condition as before the fire, covers the period needed to place the contract for repairs, and was not limited to the time actually spent in the making of the repairs.

(For other cases, see Insurance, Cent. Dig. § 1283; Dec. Dig. § 507.)

3. INSURANCE—ACTION ON POLICY—INSTRUCTIONS.

In an action upon an insurance policy, indemnifying against the loss of rents on premises for such period as was reasonably necessary to restore the premises to the same tenantable condition as before the fire, the evidence being undisputed that from the date of the fire to the restoration of the building the rents were \$175, the insurance company contesting alone the amount of recovery, the court properly charged that, if the time actually spent was no more than was reasonably necessary, they should find for the insured for the sum of \$175.

(For other cases, see Insurance, Cent. Dig. §§ 1556, 1771-1784; Dec. Dig. § 669.)

4. INSURANCE—ACTION UPON POLICY—SUFFICIENCY OF EVIDENCE.

In an action upon an insurance policy indemnifying insured against the loss of rents on property for the period reasonably necessary to restore the property to the same tenantable condition as before the fire, evidence held to sustain a finding that the time consumed was reasonably necessary to restore the building.

(For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.)

* Decision rendered, April 4, 1914. 165 S. W. Rep. 565.

Error to Dallas County Court; W. F. Whitehurst, Judge.

Action by L. A. Pires against the Hartford Fire Insurance Company.
From a judgment for plaintiff, defendant brings error. Affirmed.

Wm. Thompson and Will C. Thompson, both of Dallas, for Plaintiff
in Error.

Cockrell, Gray & McBride, of Dallas, for Defendant in Error.

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Where, on defendant's insurance business being taken over by the P. Company, the latter offered to assume plaintiff's policy, but he refused to consent to the novation, the P. Company was under no contractual relations with plaintiff and hence he could not recover against it for defendant's alleged breach of contract resulting from the consolidation. Provident Savings Life Assur. Soc. of New York et al. vs. Ellinger (Tex).....	736
(2) P. L. 1913, p. 152, permits any stock life insurance corporation of the state to acquire its own capital stock for the benefit of its policy- holders and to convert itself into a mutual company and constitutes the Chancellor of the state the legislative agent to administer such proceedings. Held, that the Chancellor's order in such proceedings was reviewable by certiorari out of the Supreme Court and not by appeal to the Court of Errors and Appeals, regardless of the fact that it was made by the Court of Chancery. In re Prudential Ins. Co. of America (N. J.).....	161
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(2) P. L. 1913, p. 152, permits any stock life insurance corporation of the state to acquire its own capital stock for the benefit of its policy-holders and to convert itself into a mutual company and constitutes the Chancellor of the state the legislative agent to administer such proceedings. Held, that the Chancellor's order in such proceedings was reviewable by certiorari out of the Supreme Court and not by appeal to the Court of Errors and Appeals, regardless of the fact that it was made by the Court of Chancery. <i>In re. Prudential Ins. Co. of America (N. J.)</i>	161
Notices of assessments, if mailed, would be presumed to have been received. <i>State Division, Lone Star Ins. Union vs. Blaessengame (Tex.)</i>	877

III. Insurance Agents and Brokers.

(A) AGENCY FOR INSURER.	
(1) Failure of a life company to have sent to one of its agents a certificate of authority to transact business in the state would not terminate a contract between the company and such agent, but only suspended the agent's right to solicit insurance until he received the certificate. A life insurance agent cannot claim that his contract with the company was in force to allow him a commission on a policy procured and not in force as to other provisions requiring the execution of a bond, etc. <i>Fidelity Mut. Life Ins. Co. vs. Hamilton et al. (Ark.)</i>	213
Evidence, in an action by a life company for a part of first premium retained by an agent after cancellation of policy, held to show that the parties had treated the contract between them as in existence when the agent procured the policy, though the company had not sent the agent a certificate of authority to procure business as was its custom. <i>Fidelity Mut. Life Ins. Co. vs. Hamilton et al. (Ark.)</i>	213
Where defendant's only connection with fire policy was to apply for it for the owner to plaintiff's assignor, and defendant was afterwards requested by such assignor's general agent to have policy canceled, which defendant proceeded to do, it was not liable to plaintiff in damages for failure to have it properly canceled. Defendant not being the agent of plaintiff's assignor or the agent of insured. <i>Condon vs. Exton-Hall Brokerage & Vessel Agency (N. Y.)</i>	258
Where life agent's contract expressly terminated right to commissions on termination of his employment, he is not entitled to renewal commissions on premiums payable after his return. This provision is not abrogated by company changing, as authorized by the contract, such commissions on future business, nor by a mere equitable adjustment of his rights in renewal commissions on his transfer from one district to another. <i>Arensmeyer vs. Metropolitan Life Ins. Co. (Mo.)</i>	367
Vesting by statute in the Chancellor, as legislative agent, through whose instrumentality the proceeding there provided for, for acquisition by a stock life insurance company of its stock for the benefit of its policyholders, shall be administered, of authority to appoint appraisers to appraise the stock, as a basis for voting by stockholders and policyholders, on propositions to be submitted to them, is a matter of legislative discretion. <i>Ripple vs. Prudential Ins. Co. of America (N. J.)</i>	469

In an action by an agent against company to recover on agency contracts, evidence held to support a finding that it was the intention of the parties in the execution of the contracts that the agent be allowed a monthly advance to be charged against his commissions to be earned under contracts and that such advances were not intended as a salary to be paid in addition to commissions. <i>Automobile insurance.</i> Held, that defendant having retained the amount for his services without right as against plaintiff and as the money in his hands belonged to plaintiff, he was entitled to recover same in an action for money received. Where insurance company having insured certain automobiles, destroyed while in the possession of a carrier, advanced a certain sum to plaintiff pursuant to policy and employed defendant to prosecute a claim against the carrier in which defendant was successful, his claim for compensation for his services was against insurance company, not against the plaintiff. <i>Locomobile Co. of America vs. Nichols (N. Y.)</i>	534
Both agent and company treated contract as though he was working under a larger scale of commissions on a contract which provided both salary and commission, and treated salary as a monthly advance against these commissions. Held, that the agent was estopped, after so construing contract, and acquiescing in the same construction thereof by the company, to thereafter insist that he was working on a salary basis. <i>Generes vs. Security Life Ins. Co. of America (Tex.)</i>	471
Where agent sued for commissions alleged to be due in accordance with contract, he had an adequate remedy at law and could not maintain a suit for an accounting. <i>Hicks vs. Penn Mut. Life Ins. Co. (U. S.)</i>	539
When a general insurance agent obtained insurance from defendant through its agent, he became agent of the insurer in the transaction. <i>Macatawa Transp. Co. vs. Firemen's Fund Ins. Co. (Mich.)</i>	786
(2) The fact of agency may be assumed from the natural improbability that one should, without authority, assume to act for another for a considerable length of time and from the fact that such conduct would become known by the purported principal. While one who was employed to collect from plaintiff, a former agent, balance due the company, was authorized to employ all appropriate means to collect such amount, he was not authorized to institute embezzlement prosecution so that the company would not be liable in malicious prosecution if he did so. <i>Russell vs. Palentine Ins. Co. (Miss.)</i>	356
Held, that in the absence of fraud or collusion the company could not deny liability on account of its agent's relation to mortgagors. <i>Citizens' State Bank of Chautauque et al. vs. Shawnee Fire Ins. Co. (Kan.)</i>	403
(B) AGENCY FOR APPLICANT, OR INSURED.	
The fact that the statute required foreign insurer to obtain a certificate of authority for plaintiff to act as his agent does not preclude it from setting up the illegality of plaintiff's act so as to defeat an action for compensation. <i>Pride vs. Commercial Union Ins. Co., Ltd. of London, England (Ala.)</i>	491
Agency contract. Held, that plaintiff having received commissions on policies issued to date of cancellation, was not entitled to recover commissions on new policies. Held, further that there was no contractual relation between plaintiff and defendant and plaintiff could not recover commissions on premiums received after cancellation of original policies. <i>Degnan vs. General Accident, Fire & Life Assur. Corporation (N. Y.)</i>	677
Held, on the facts stated in representing an unauthorized company, insurance agent was agent of such unauthorized company, and personally liable on policy. <i>Drummond vs. White-Swearingen Realty Co. (Tex.)</i>	800
IV. Insurable Interest.	
(B) INSURABLE INTEREST IN PROPERTY.	
A warehouseman may procure a valid policy covering merchandise which may be subsequently stored with him. <i>Johnson vs. Stewart et al. (Pa.)</i>	794
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(C) INSURANCE INTEREST IN HUMAN LIFE OR HEALTH.	
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<p>benefit was a bona fide transaction, consummated with honest purpose of protecting the corporation against loss, and was not obnoxious to public policy. Mutual Life Insurance Co. of N. Y. vs. Board, Armstrong & Co. Corporation (Va.).....</p> <p>(F) ASSIGNMENT OF POLICY TO PERSON WITHOUT INTEREST.</p> <p>Assignment of life policy to one having no insurable interest is void as within the rule against wagering policies. Life policy may be lawfully assigned as security for indebtedness of assured, though creditor has no insurable interest in his life. Tripp vs. Jordan et al. (Mo.).....</p> <p>It is immaterial with respect to the rights of the company and the original beneficiary, whether the rights under assignment were legal or equitable; the transaction having been completed. Cornell vs. Mutual Life Ins. Co. of New York (Mo.).....</p> <p>A contingent interest, such as assured's right to cash surrender value after twenty years could be assigned before such time had expired. Cornell vs. Mutual Life Ins. Co. of New York (Mo.)..</p> <p>(G) EXTINGUISHMENT OF INTEREST.</p> <p>Facts introduced by the defendant itself without objection showing a waiver of proof of notice will bar defendant to say that there was no waiver pleaded. Douville vs. Pacific Coast Casualty Co. (Idaho)</p>	<p>378</p> <p>589</p> <p>726</p> <p>736</p> <p>518</p>
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V. The Contract in General.

<p>(A) NATURE, REQUISITES, AND VALIDITY.</p> <p>(1) To constitute a binding contract of insurance there must be a meeting of the minds of parties with authority to contract. Shawnee Mutual Fire Ins. Co. vs. McClure et al. (Okla.).....</p> <p>Application made and policy delivered in New Mexico is a New Mexico contract. Lange vs. New York Life Ins. Co. (Mo.).....</p> <p>On the facts stated the policy waived a New York statute prohibiting forfeiture for nonpayment of premiums in absence of notice of the maturity thereof, given by mail to the insured or assignee. Lange vs. New York Life Ins. Co. (Mo.).....</p> <p>Life policy executed at Milwaukee and payable there was a Wisconsin contract, though insured and beneficiary reside in another state. Northwestern Mutual Life Ins. Co. vs. Adams et al. (Wis.).....</p> <p>Evidence did not authorize a finding that agent of company who issued policy was also agent of insured so as to invalidate contract. Failure of an agent to comply with instructions of his principal which were not communicated to the insured, to attach a "rider" the effect of which would have been to cancel the policy, could not operate to the prejudice of the insured. Southern States Fire Ins. Co. vs. Tabor et al. (Ga.).....</p> <p>Cashier of branch office was authorized to bind defendant by giving out information concerning the value of policies and to represent to assignee of a policy that only \$18.40 was necessary to pay premium. Lange vs. N. Y. Life Ins. Co. (Mo.).....</p> <p>Facts introduced by the defendant itself without objection showing a waiver of proof of notice will bar defendant to say that there was no waiver pleaded. Douville vs. Pacific Coast Casualty Co. (Idaho)</p> <p>Traveling soliciting agent—authority Dorman vs. Connecticut Fire Ins. Co. (Okla.)</p> <p>Insurance laws of New York and charter of insurance company examined and found to contain nothing which is in conflict with the terms of the insurance contract as written. Cilek vs. New York Life Ins. Co. (Neb.)</p> <p>Contract of pure endowment was not a contract of insurance within Rev. Laws c. 118, § 3, defining an insurance contract. Curtis vs. New York Life Ins. Co. (Mass.)</p> <p>Where beneficiary joins with insured in application for loan she cannot afterwards claim it was made without her knowledge or authority. Cilek vs. New York Life Ins. Co. (Neb.)</p> <p>A warehouseman may procure a valid policy covering merchandise which may be subsequently stored with him. Johnson vs. Stewart et al. (Pa.)</p> <p>Steamship company has insurable interest on freightage on a cargo of lumber which it was loading at the time the covering agreement for insurance was made. Victoria S. S. Co. vs. Western Assur. Co. of Toronto (Cal.)</p> <p>(3) Automatic insurance—loss on policy—noted and policy retained by company—default—no notice to assured—no acknowledgment made on policy until one month after death of insured and six months after default—company ignorant of insured's death. Held, neither failure of company to take action prior to death nor subsequent endorsement on policy constituted a waiver by company of profits of policy and it was liable only after excess of paid up insurance over the amount of the loan. N. Y. Life Ins. Co. vs. Conner (Ky.).....</p>	<p>51</p> <p>565</p> <p>568</p> <p>568</p> <p>400</p> <p>568</p> <p>518</p> <p>642</p> <p>591</p> <p>551</p> <p>591</p> <p>794</p> <p>804</p> <p>804</p>
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(4) An application for insurance subject to approval or rejection of the company to which it is made is merely a step in the creation of a contract to insure. When the application is made out and for- warded to the company, it is not yet a contract. It requires an acceptance by the other side before it can be said that the minds of the parties have met upon the terms. Held, there was no contract of insurance. <i>Shawnee Mutual Fire Ins. Co. vs. McClure et al. (Okla.)</i>	91
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(5) Binding slip issued on application is mere written memorandum of most important terms of a preliminary contract of insurance intended to give temporary protection pending investigation of risk by assured or until issue of a formal policy and is subject to all the conditions of the contemplated policy though it may never issue. It protects applicant against contingency of sick- ness between date and delivery of policy if his application is ac- cepted; but if not the slip ceases eo instanti to have any effect. <i>Gardner vs. North State Mut. Life Ins. Co. (N. C.)</i>	35
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Application in transit in home office, held there was no completed contract since the minds of the parties had not met. <i>Mutual Life Ins. Co. vs. Jordan</i> (Ark.)	581
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Endowment policy. On the facts stated, held, that limitations had never begun to run; that the wife was entitled to reformation. <i>Ulman vs. Newman et al. (N. Y.)</i>	556
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Receipts for premiums in renewal of a fidelity bond serve only to extend to a new period of time the indemnity provided by the original bond. <i>John Church Co. vs. Aetna Indemnity Co.—Aetna Indemnity Co. vs. John Church Co. (Ga.)</i>	682
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In case of doubt, insurance policy will be construed in favor of insured and the policy will not be permitted to be negated by a doubtful clause. <i>Pacific Mut. Life Ins. Co. vs. McCabe (Ky.)</i>	507
Unambiguous insurance contracts must be construed according to their plain meaning, all doubts must be resolved in favor of insured. <i>Monongahela Ins. Co. et al., vs. Batson (Ark.)</i>	501
Where there is no uncertainty as to its meaning and it is legal and not opposed by public policy, insured's contract will be enforced as it is made. <i>Cleek vs. New York Life Ins. Co. (Neb.)</i>	591
Contract is to be construed so as to give effect of manifest intention of both parties even though contract in present case be held to be one of fidelity insurance, still the rule of two constructions, the one favorable to insured must be adopted cannot be availed of to refine away the terms of contract expressed with sufficient clearness to convey the plain meaning to all parties. <i>John Church Co. vs.</i>	

Etna Indemnity Co.—Etna Indemnity Co. vs. John Church Co. (Ga.)	682
Recourse may be had to preliminary negotiations for the purpose of determining correct construction of contract. Mather et al. vs. London Guarantee & Accident Co., Ltd. (Minn.)	656
Ambiguous conditions should be construed most strongly against insurer. A life policy in the language of insurer is presumed to contain all conditions intended to be imposed. Francis vs. Prudential Ins. Co. of America (Pa.)	709
The language of a policy must be clear and unambiguous and any doubt in the meaning shall be resolved against the insurer. Farmers' Mut. Equity Ins. Society vs. Smith (Ky.)	788
Avoidance provision, if fairly susceptible to two constructions, that which is favorable to insured will be adopted. Henderson vs. Abbeville Greenwood Mut. Ins. Ass'n (S. C.)	796
Rule of construction in ambiguity applies with greater force to a covering agreement than to the policy itself. Victoria S. S. Co. vs. Western Assur. Co. of Toronto (Cal.)	804
Policy insuring against violent death "not result of member's own vicious conduct" was ambiguous and should therefore be construed more strongly against insurer. Railway Mail Ass'n vs. Moseley et al. (U. S.)	807
Where terms of a contract are ambiguous they must be held to mean what they clearly express and no room is left for construction. McKinney vs. General Accident, Fire & Life Assur. Co., Ltd. (U. S.)	820
(2) A bailor of products cannot recover under policy procured by warehouseman unless it appears that he intended in taking out the policy to cover bailor's interest. Bailor may adopt benefit of insurance previously effected by warehouseman if he notify the latter before proof of loss is made. Johnson vs. Stewart et al. (Pa.)	794
(3) Vestibules enclosing about twenty-five to thirty square feet of floor space installed to protect employees in cold weather, which, although more elaborate, were of the same nature as storm doors and windows, were not an "addition" within the meaning of a liability policy. Kresge vs. Maryland Casualty Co. (Wis.)	146
Held, that a grain separator standing on a vacant lot adjacent to property was included in the policy. German-American Ins. Co. "a. Messenger (Colo.)	98
It is a rule that where there is an inaccuracy in the description of premises in a policy, erroneous part may be rejected without affecting the policy, if enough remained to identify the premises intended. Curnen vs. Law Union & Rock Ins. Co., Ltd. (N. Y.)	245
Insurance upon household and kitchen furniture to run three years includes furniture acquired subsequent to issuance. Delaware Ins. Co. vs. Wallace (Tex.)	265
Broker's error in describing building as situated at northeast instead of northwest corner, did not avoid insurance where there was no other building on either of the four corners. Curnen vs. Law Union & Rock Ins. Co., Ltd. (N. Y.)	245
Insured pledged policy as security for loan on contract containing an express promise to repay and redeem. Held, contract created a personal obligation on insured and though pledge was void the personal obligation remained. Gilien vs. N. Y. Life Ins. Co. (Mo.)	181
Recourse may be had to preliminary negotiations for the purpose of determining correct construction of contract. Mather et al. vs. London Guarantee & Accident Co., Ltd. (Minn.)	656
Fire policy on toilet articles, labels, machinery, etc. as a matter of common knowledge, covers cornstarch. Aachen & Munich Fire Ins. Co. vs. Arabian Toilet Goods Co. (Ala.)	634
The term "survey" as used in marine insurance, in its direct significance, as well as in the broader meaning, imports only a plan and description of the present existing state and condition, and mode of use of the property, so that, so far as representations therein are of an executory nature, or relate to the use or occupation of the premises subsequent to the policy, the owner is not bound by them. Macatawa Transp. Co. vs. Firemen's Fund Ins. Co. (Mich.)	786
Policy on warehouse will cover malt not in warehouse at time policy is issued, but subsequently shipped thereto, though the shippers have made no arrangements with warehouseman relative to insurance. Johnson vs. Stewart et al. (Pa.)	794
(4) Tontine policy. Estimated profit. On the facts stated, held, that statements sent with the policy, although considered part of the contract did not guarantee or promise cash value of \$8,180 at maturity, it being expressly stated that it was illustrative of the options given the holder and that the figures were based on the results of other tontine policies, hence owner was only entitled to earnings rightly apportioned to his policy. Tourtellotte et al. vs. New York Life Ins. Co. (Wis.)	244
Covering agreement for insurance of freightage on cargo of lumber, where quantity to be carried was to be determined by the	

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	charterer and the rate was already established, was not an open policy. <i>Victoria S. S. Co. vs. Western Assur. Co. of Toronto (Cal.)</i>	804
(5)	Provision as to acceptance of life policy while in good health became part of proposed contract and fixed the time when the policy became operative and insurance began. <i>Bowen vs. Prudential Ins. Co. of America (Mich.)</i>	194
	Life and accident policy held to be a continuous one and subject to lapse only for nonpayment of the premium either before or after the expiration of the first five-year period and hence had not terminated prior to injury. Such policy being a continuous one, a provision of the by-laws that benefits would not be paid for illness or death occurring before policy had been in force two months would not apply to first two months of second fifth-year period. <i>Turner vs. N. Y. Safety Reserve Fund (N. Y.)</i>	274
VL	Premiums, Dues, and Assessments.	
(A)	PREMIUMS, DUES, AND ASSESSMENTS.	
	Held, condition providing for payment by mortgagees on default of assured, a condition and not a covenant, since the word "provided" means "if", or "on condition" and is used to express a condition. <i>Coykendall vs. Blackmer (N. Y.)</i>	614
(B)	PREMIUM OR DEPOSIT NOTES, AND ASSESSMENTS THEREIN.	
(1)	Whether insurer can recover on a policy depends on whether insured authorized its issuance. <i>American Fire Ins. Co. of Newark vs. Minster Realty Co. (N. Y.)</i>	248
	The amount demanded in good faith and not the amount recovered determines jurisdiction and hence Superior Court has jurisdiction in an action on insurance policy in which demand made in good faith was for \$202. <i>Tillary vs. Royal Benefit Society et al. (N. C.)</i>	596
(2)	A suit in equity can be maintained to compel the officers of an association to levy such assessment for the purpose of paying a loss duly proved and adjusted. The members of the association were not necessary parties, it not appearing that they refused or objected to the paying of the claim. A judgment against such association for the amount due could not be rendered, the association not being properly in court. <i>Kimball vs. Lower Columbia Fire Relief Assn. of Oregon et al. (Ore.)</i>	98
	Insured in mutual fire company not relieved from forfeiture of a policy because of nonpayment of assessment, when she received no notice, as she had not notified secretary of new address. Post-card notice is not a waiver if its right to give notice by second-class mail. <i>Mutual Fire Ins. Co. vs. Turner (Va.)</i>	88
	Action by receiver of insolvent assessment fire insurance company. Held, member who paid three times regular premium on condition that he would be guaranteed from assessments was not liable. <i>Wetmore vs. McElroy (S. C.)</i>	262
	Fidelity insurance. Held, on the facts stated, that M's collection of accounts assigned by him to plaintiff and appropriation of proceeds to his own use, were not acts committed in course of employment described in the bond so as to make defendant liable therefor. The words "for same" meant "for myself". <i>Coyle vs. United States Fidelity & Guaranty Co. (Mass.)</i>	667
	The amount demanded in good faith and not the amount recovered determines jurisdiction and hence Superior Court has jurisdiction in an action on insurance policy in which demand made in good faith was for \$202. <i>Tillary vs. Royal Benefit Society et al. (N. C.)</i>	596
(3)	Where defense was that goods had been removed, evidence of a telephone conversation with agents admissible where facts and circumstances were sufficient to warrant a finding that communication was in fact between insured and agents of insurer. <i>Delaware Ins. Co. vs. Wallace (Tex.)</i>	265
(4)	The amount demanded in good faith and not the amount recovered determines jurisdiction and hence Superior Court has jurisdiction in an action on insurance policy in which demand made in good faith was for \$202. <i>Tillary vs. Royal Benefit Society et al. (N. C.)</i>	596
(C)	REFUNDING OR RECOVERY OF PREMIUMS OR ASSESSMENTS.	
	Held, that plaintiff and insurance broker having advanced premium to defendants, and they having paid same to receivers of the insurers, defendants had no money belonging to plaintiff which in equity they ought not to keep, and hence were not liable to plaintiff in assumpst. <i>Walmsley vs. Stowell et al. (Mo.)</i>	88
	Averments of plaintiff's amended petition examined, and found to be insufficient. <i>Witt vs. Old Line Bankers' Life Ins. Co. (Neb.)</i>	871
	Where policy contains usual vacancy provision, it is not bound to return any unearned premium unless policy is surrendered. <i>Schmidt vs. Williamsburgh City Fire Ins. Co. of Brooklyn, N. Y. (Neb.)</i> ..	404
	Recovery of advanced premium. Where plaintiff alleges that he has refused to submit to medical examination as provided for it is incumbent upon plaintiff to allege and prove that contract has been rescinded. <i>Witt vs. Old Line Bankers' Life Ins. Co. (Neb.)</i> ..	871

Civ. Code providing that insured is entitled to return of premium paid, if company has incurred no risk or liability under the policy, is declaratory of the common-law rule. <i>Grabinaski vs. United States Annuity & Life Ins. Co. (S. D.)</i>	470
The amount demanded in good faith and not the amount recovered determines jurisdiction and hence Superior Court has jurisdiction in an action on insurance policy in which demand made in good faith was for \$202. <i>Tillary vs. Royal Benefit Society et al. (N. C.)</i> 586	

VII. Assignment or Other Transfer of Policy.

(A) NATURE OF RIGHT IN GENERAL.

A pre-existing indebtedness constitutes a sufficient consideration for an assignment. <i>Kaus vs. Gracey et al. (Iowa)</i>	287
An assignment of a chose in action, may be required to be according to the requirements of the state where the assignment is made, though the contract be executed in another state. The fact that insured made assignment while temporarily a resident of Minnesota would not prevent assignment from being valid and enforceable in Wisconsin. <i>Northwestern Mutual Life Ins. Co. vs. Adams et al. (Wis.)</i>	381
It is immaterial with respect to the rights of the company and the original beneficiary, whether the rights under assignment were legal or equitable; the transaction having been completed. <i>Cornell vs. Mutual Life Ins. Co. of New York (Mo.)</i>	726
A contingent interest, such as assured's right to cash surrender value after twenty years could be assigned before such time had expired. <i>Cornell vs. Mutual Life Ins. Co. of New York (Mo.)</i> ..	726
Policy may be assigned without beneficiary's consent if it provides for assignment or change of beneficiary. <i>Cornell vs. Mutual Life Ins. Co. of New York (Mo.)</i>	726
Assignment of assured's right to cash surrender need not be in writing, but could be made by mere deposit of policy as collateral security. <i>Cornell vs. Mutual Life Ins. Co. of New York (Mo.)</i> ... 726	

(B) FORM, REQUISITES, AND VALIDITY OF ASSIGNMENT.

Whether an assignment of an accident policy to defendants was obtained by duress held for jury. <i>Kaus vs. Gracey et al. (Iowa)</i> ... 287	
Evidence that insured executed assignment to his wife, that it was not sent to home office of insurer in accordance with the terms of policy, acknowledged and returned by insurer, pasted on policy and so remained for more than thirty years until after the death of his wife, is sufficient to warrant presumption of legal delivery of assignment, not negatived by the assignment being found among insured's papers after his death, subsequent to hers. <i>Shorey vs. Webb (Md.)</i>	481
Where one having paid-up policy was induced to make an assignment thereof by fraud of assignee, who had no insurable interest, by whom it was assigned to an innocent party for value, the second assignment was subject to the equities between the original assignor and his assignee. <i>Tripp vs. Jordan et al. (Mo.)</i>	589
Held, to sustain a finding that signature of assignor was not a forgery and that assignment was genuine. <i>Kirchberg vs. Union Trust Co. (Mich.)</i>	724

(C) RIGHTS, LIABILITIES, AND REMEDIES OF PARTIES.

Assignee of the policy acquires only the rights of the insured, and such assignment will not divest the right of the beneficiary to collect the proceeds, it appearing that the only right insured had was to collect policy upon maturity or to change the form of insurance. <i>Johnson vs. N. Y. Life Ins. Co. (Colo.)</i>	486
After life policy was assigned or pledged pursuant to a provision therein, authorizing its assignment, the assignee or pledgee could without subsequent ratification or authorization, foreclose and enforce the assignment. <i>Cornell vs. Mutual Life Ins. Co. of New York (Mo.)</i>	726

VIII. Cancellation, Surrender, Abandonment, or Rescission of Policy.

(A) CANCELLATION.

Provision requiring five days' notice was for the benefit of the insured, and was subject to waiver by him and was waived where he had made an insurance agent his agent to insure on expiration or cancellation any policy, on such agent receiving within five days a new policy in another company after receiving notice of cancellation of an existing policy on plaintiff's property, though plaintiff was not personally notified of the cancellation. <i>Warren vs. Franklin Fire Ins. Co. et al.—Same vs. Pennsylvania Fire Ins. Co. et al. (Iowa)</i>	94
Held, mutual fire society had power to adopt an amendment to deed of settlement authorizing cancellation of any insurance policy upon return of deposit money alone without return of a propor-	

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tionate share of the accumulated profits. Commonwealth ex rel. Todd, Atty.-Gen. vs. Philadelphia Contributionship (Pa.).....	361
A written notice of cancellation under cancellation clause examined and held to be sufficient in form. Notice of cancellation of an insurance policy in registered envelope received by insured and unopened by him, bearing on its face the card of an insurance company other than the one in which insured held a policy, although having upon it the name of the same agents as those of the company in which he was insured was not, in and of itself, notice of cancellation as it appeared on its face to be a communication from a concern with which he had no business, he was not obliged to open it and in the absence of actual knowledge of its contents was not bound by the notice which it contained. Fritz vs. Pennsylvania Fire Ins. Co. (N. J.).....	360
Mere authority of a broker to effect insurance does not authorize him to cancel it with the effect of making his principal chargeable with the short rate premium. American Fire Ins. Co. of Newark vs. Minsker Realty Co. (N. Y.).....	343
Separate actions cannot be maintained by insured and mortgagee to whom any loss was payable, to recover separately amount payable to each thereunder. O'Neill vs. Franklin Fire Ins. Co. of Philadelphia et al. (N. Y.).....	388
Adjuster of liability company, sent out with power to ascertain extent of injuries and to settle claim, has sufficient power to authorize insured to continue to provide medical service to servant. It is a condition precedent to a recovery of expenses incurred by insured that the payment be not made until after the trial of the issues or with the written consent of the company. Dunham vs. Philadelphia Casualty Co. (Mo.).....	432
Where notice to insured is a condition precedent to cancellation, notice to broker is not notice to insured. While insured may ratify notice of cancellation given only to broker, there is no ratification where the broker did not secure any substitute policy as was his custom. National Union Fire Ins. Co. of Pittsburgh, Pa. vs. Baltimore Asbestos Co., Inc. (Md.).....	493
Legal tender of unearned premium, unless waived by insured is essential to a valid cancellation. Held, on the facts stated there was no waiver by insured. Niagara Fire Ins. Co. vs. Mitchell (Tex.)...	646
Where insured mortgages property without consent of company, insurer cannot elect to declare policy void without returning or offering to return pro rata unearned premiums. St. Paul Fire & Marine Ins. Co. vs. Pech (Okla.).....	649
Liability insurance. Held, that insured by electing to defend and deny insured right to settle on his own account and by refusing to pay stipulated indemnity except upon satisfaction of judgment, violated the obligation of good faith which underlies all contracts and was liable for expenses incurred by insured in prosecuting appeal. Brassil vs. Maryland Casualty Co. (N. Y.).....	672
Plaintiff's measure of damages was value of policy at time of its breach, consisting of difference between what it would have cost him to mature policy from time of such breach to end of his expectancy, had there been no breach, and what it would have cost him to mature a like policy in a solvent company for the same period, and not amount of premiums paid with interest. Provident Savings Life Assur. Soc. of New York et al. vs. Ellinger (Tex.)	736
Consolidation. Held, on facts stated, it was not shown that defendant had breached its insurance contract with plaintiff by refusing to perform the same as to entitle latter to recover damages therefor. Provident Savings Life Assur. Soc. of New York et al. vs. Ellinger (Tex.)	736
(B) SURRENDER, CANCELLATION, OR ABANDONMENT BY INSURED.	
Mere authority of a broker to effect insurance does not authorize him to cancel it with the effect of making his principal chargeable with the short rate premium. American Fire Ins. Co. of Newark vs. Minsker Realty Co. (N. Y.).....	343
Cancellation—repayment of proper proportion of premium unless waived is essential to a valid cancellation. Polemanakos vs. Austin Fire Ins. Co. (Tex.).....	366
Insured could consent to surrender of the policy and application of its proceeds to the payment of his loan either directly or by way of estoppel. Gillen vs. N. Y. Life Ins. Co. (Mo.).....	181
Pledge of life policy to secure loan, contract providing that in case of default in payment of premium or interest, company could foreclose the pledge and satisfy loan out of net value of policy was not a surrender of policy under Rev. St. 1899, § 7900, providing that insured may at any time surrender his policy for a consideration adequate to himself. Gillen vs. N. Y. Life Ins. Co. (Mo.).	181
(C) RESCISSION.	
Where the answer alleges violation of the additional insurance clause, but fails to allege a compliance with the terms of the policy	

which prescribes that in case the company elects to cancel it shall do so by returning to the insured the pro rata premium, etc., and does not allege payment or tender to insured of pro rata premium and the giving of written notice to insured, does not sufficiently complete an allegation on the part of company to declare policy void. <i>St. Paul Fire & Marine Co. vs. Bragg (Okla.)</i> 498	
Where an insurance policy obligated the insurer to pay \$3,000 to insured's wife at his death, there could be no breach by the insurer by failure to perform prior to the insured's death. <i>Provident Savings Life Assur. Soc. of New York et al. vs. Ellinger (Tex.)</i>	736
Where the acting president of a private corporation, without authority, obtained insurance for it and his act in doing so was not ratified prior to loss, insurer prior to ratification was entitled to withdraw from contract and did so by giving notice that it elected to treat the policy as void from the beginning. <i>Marguise vs. Insurance Co. of North America (U. S.)—Kline Bros. & Co. vs. Liverpool & London & Globe Ins. Co., Ltd. (U. S.)</i>	775

IX. Avoidance of Policy for Misrepresentation, Fraud, or Breach of Warranty or Condition.

(A) GROUNDS IN GENERAL.

(1) Construing Laws 1907, c. 220, 5, par. 4 (Rev. Laws Supp. 1909, subd. 6, § 1695, par. 4): Material misrepresentation, made with intent to deceive avoids the policy; material misrepresentation, not made with intent to deceive does not avoid the policy unless matter misrepresented increased the risk of loss; and if it does increase the risk of loss, the policy is avoided, regardless of intent; immaterial misrepresentation, though made with intent to deceive does not avoid the policy. <i>Johnson vs. National Life Ins. Co. (Minn.)</i>	222
Separate actions cannot be maintained by insured and mortgagee to whom any loss was payable, to recover separately amount payable to each thereunder. <i>O'Neill vs. Franklin Fire Ins. Co. of Philadelphia et al. (N. Y.)</i>	388
False and material statements void the policy whether made as result of intention or mistake. <i>Germania Life Ins. Co. of N. Y. City vs. Klein (Colo.)</i>	353
Misrepresentation will avoid policy under code if such is to change nature, extent or character of risk. <i>Prudential Insurance Co. of America, Petitioner, vs. John T. Moore, Administrator of John Andrew Salgue, deceased (U. S.)</i>	321
Misrepresentation will avoid policy under code if such is to change nature, extent or character of risk. <i>Etna Life Ins. Co., Petitioner, vs. John T. Moore, Administrator of John A. Salgue, deceased (U. S.)</i>	311
In an action by beneficiary on life policy where defense is insured misrepresented his age and health, his declarations cannot be received in evidence to prove the truth of the representations; but after proof has been introduced tending to show his age or health, it was different from what he represented it to be such declarations may be received to show that he had knowledge of his age and condition, and fraudulently misrepresented them. <i>Metropolitan Life Ins. Co. of N. Y. vs. O'Grady (Va.)</i>	475
(2) Agents of marine company who accepted part of a line and turned portion over to brokers of another company became latter's agents and a concealment made by them will not avoid the policy. <i>California Reclamation Co. vs. New Zealand Ins. Co. (Cal.)</i>	654
(4) Representation is a statement proffered as a basis for an insurance contract and must be substantially true. A "warranty" is a statement or covenant of a contract which must be strictly or literally fulfilled. Where the defense was misrepresentation it was error to admit in evidence testimony of physician as to condition of insured four years prior to application. <i>Johnson vs. National Life Ins. Co. (Minn.)</i>	222
Where a printed statement in an application for credit insurance stated that the applicant knew nothing detrimental to the credit of any customer "which would affect his policy except as follows," was stricken from the application before it was signed, insured could presume that no information was required as to doubtful accounts. <i>L. Black Co. vs. London Guarantee & Accident Co. Ltd., (N. Y.)</i>	801
Held, that Sections 2608 and 2610 applied to an express as well as implied warranty and under these sections the common law rule that a breach of an express warranty avoids the policy, whether material or not, does not apply. <i>Victoria S. S. Co. vs. Western Assur. Co. of Toronto (Cal.)</i>	804
False representations will not avoid policy unless made fraudulently. <i>Mutual Life Ins. Co. of New York vs. Hilton-Green et al. (U. S.)</i>	685
(6) It is unnecessary that defendant, with its defense, that policy sued on was obtained by fraud, tender the premiums received but, if it prevails there should be a judgment against $\frac{1}{2}$ for such premiums	

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without additional pleadings. Knights of Maccabees of the World vs. Shields (Ky.) Only required that the condition of the vessel and the stowage of the cargo should be satisfactory to the surveyor, who may be regarded as agent of insurer or at least joint agent of both parties. Victoria S. S. Co. vs. Western Assur. Co. of Toronto (Cal.)	459 804
(B) MATTERS RELATING TO PROPERTY OR INTEREST INSURED.	
(1) Where in an action on benefit certificate defendant pleaded that when insured died certificate had been canceled for nonpayment of dues, a witness who was employed by the agent of defendant's local homestead to assist in keeping the books, make out receipts etc. was not an agent of defendant company and therefore not disqualified to testify. Rousseau vs. Brotherhood of American Yeoman (Mich.) (2) Unconditional ownership clause had no application as the property insured was not part of the real estate, but lumber in a building in process of demolition. Ensel vs. Lumber Ins. Co. of New York et al. (Ohio). Policy containing unconditional ownership clause. Held, the mortgage lien upon lumber was discharged. For this and other reasons this defense was properly excluded. Ensel vs. Lumber Ins. Co. of New York et al. (Ohio) In an action against a defendant which has assumed the obligations of a benefit certificate which provides for the payment to the defendant of the proceeds of one assessment not exceeding \$2,000, plaintiff need not allege and prove what the proceeds of an assessment would be, but the burden is on the defendant to show that it would be less than \$2,000, and where company has assumed obligations of a fraternal order and has accepted, without objection, plaintiff's dues, it cannot escape liability on the ground that its contract with plaintiff is ultra vires. Spande vs. Western Life Indemnity Co. (Ore.)	38 60 60 237
It was no defense that employee had previously been a defaulter where the employer had no knowledge thereof, though it was provided in a preceding clause of the bond that, "if the employer's written statements heretofore referred to shall be found in any respects untrue this bond shall be void." Legier et al. vs. United States Fidelity & Guaranty Co. (Ohio) Though it be not recorded one who has made a contract of sale of property, on which the purchaser has made payment and under which he has entered into possession, is not the sole and unconditional owner as required by fire policy. Sherman vs. Continental Ins. Co. of City of N. Y. (Cal.)	436 476
Controversy between the wife and illegitimate daughter of insured. Evidence that insured was very fond of daughter and expressed an intention at the time of changing policy to provide for her in some other method, was relevant to such issues. Maxey vs. Franklin Life Ins. Co. et al. (Tex.) Under statute, the fact that insured misrepresented value of stove could not affect liability of company where total value of property was destroyed, exclusive of stove, was largely in excess of amount of policy. Camden Fire Ins. Ass'n of Camden, N. J. vs. Puett (Tex.) Failure to communicate to company threat to burn sanitarium would not avoid the policy. Washington Fire Ins. Co. et al. vs. Cobb et al. (Tex.)	605 645 647
(C) MATTERS RELATING TO PERSON INSURED.	
(1) Warranty, that applicant had not been intimately associated with any one suffering from any transmissible disease within the last year being material, vitiated binding receipt and the policy subsequently issued unless insurer waived the same. Every fact which is untrue stated or wrongfully suppressed in an application for insurance must be regarded as material. Where question is so framed as to call for a true statement, applicant is required to make full and fair disclosure thereof or at least a substantial one. Gardner vs. North State Mut. Life Ins. Co. (N. C.) Misrepresentation by an applicant for life insurance of her age that she was fifty years old at her nearest birthday, while in fact sixty-three, defeats only the policy pro tanto, and insurer is liable to the amount of the insurance which the premium paid would have purchased at the age of sixty-three. Germania Life Ins. Co. of N. Y. City vs. Klein (Colo.)	25 353
Previous application to another company denied by applicant avoided policy under Georgia Code. Elina Life Ins. Co., Petitioner, vs. John T. Moore, Administrator of John A. Salgue, deceased (U. S.) Previous application to another company denied by applicant avoided policy under Georgia Code. Prudential Insurance Co. of America, Petitioner, vs. John T. Moore, Administrator of John Andrew Salgue, deceased (U. S.)	311 821
(2) Misrepresentations in the application that insured was in good health would not avoid the policy unless he was then suffering from an infirmity which actually contributed to his death. Roedel vs. John Hancock Mut. Life Ins. Co. (Mo.)	43

Statements that applicant had not had any of the diseases inquired of nor consulted a physician while in fact she had, was false statement voiding the policy. <i>Germania Life Ins. Co. of N. Y. City vs. Klein (Colo.)</i>	353
"Substantially true" does not mean somewhat true or partially true, nor true in every possible immaterial respect, but means true in all material respects. <i>McEwen vs. New York Life Ins. Co. (Cal.)</i>	546
Alleged false representation was not a defense where it was not shown that ailment for which assured consulted physician was of such serious nature as to materially affect his health. <i>Mutual Life Ins. Co. of New York vs. Owen (Ark.)</i>	580
Representation of no previous application avoids policy unless insurer is estopped by a knowledge of falsity. <i>Mutual Life Ins. Co. of New York vs. Hilton-Green et al. (U. S.)</i>	685

X. Forfeiture of Policy for Breach of Promissory Warranty, Covenant or Condition Subsequent.

(A) GROUNDS IN GENERAL.

Presence prior to fire of forbidden gasoline on the premises it having been removed before the fire, did not affect liability for loss; the policy not providing that it should be void for such presence, but only that insurer should not be liable for loss occurring while the risk was so increased. <i>O'Neill vs. Caledonian Ins. Co. Same vs. American Ins. Co. (Cal.)</i>	83
Plaintiff is not bound to prove terms of contract between owner and defendant, but makes a case for the jury, when he shows that defendant has promised to assume the burden of such other order and that relying on such terms, plaintiff had paid the defendant premiums which would have otherwise been due the order. <i>Spande vs. Western Life Indemnity Co. (Ore.)</i>	227
Where policy provides for forfeiture except that certain rights may be exercised upon the insured taking action, insurer need not take any affirmative action to forfeit the policy. <i>Patterson vs. Equitable Life Assur. Society (Ark.)</i>	717

(B) MATTERS RELATING TO PROPERTY OR INTEREST INSURED.

(1) Length of tow is material question affecting a risk. <i>California Reclamation Co. vs. New Zealand Ins. Co. (Cal.)</i>	654
(2) Presence prior to fire of forbidden gasoline on the premises, it having been removed before the fire, did not affect liability for loss; the policy not providing that it should be void for such presence, but only that insurer should not be liable for loss occurring while the risk was so increased. <i>O'Neill vs. Caledonian Ins. Co. Same vs. American Ins. Co. (Cal.)</i>	83
Presence on the premises at the time of fire of several automobiles, each with gasoline in its tank, did not suspend the fire policy. The warranty in the rider on the policy that no gasoline other than in the reservoirs of machines shall be admitted into the building where "the machine is permanently or temporarily stabled," allowing more than one machine to be kept there. <i>O'Neill vs. Caledonian Ins. Co.—Same vs. American Ins. Co. (Cal.)</i>	82
Mere leaving of insured personal property in a building where insured, in the custody of an occupant whose tenancy commenced after the date of insurance, and who was without any control over the property otherwise than to hold it subject to order of the insured, did not constitute a "change of possession." <i>Linglebach vs. Theresa Village Fire Ins. Co. (Wis.)</i>	96
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One between the age of fifteen and sixteen who was employed in violation of law, is a child within an indemnity policy exempting insurer. Louis F. Kleeman Co. vs. New Amsterdam Casualty Co. (Mo.)	681

(B) INSURANCE OF PROPERTY AND TITLES.

(1) Under fire policy exempting insurer from loss occasioned by locomotives insurer was liable for fire communicated from building on a building on right of way, though such building was set on fire by sparks from locomotive; the exempting clause contemplating a fire directly caused by sparks from a locomotive. Montgomery et al. vs. Southern Mut. Ins. Co. (Pa.).....	260
Insurer issuing plate glass policy thereby agreed to indemnify insured for loss by breakage occasioned by wrongful act of third person. Weaver vs. N. J. Fidelity & Plate Glass Ins. Co. (Colo.).....	207
(2) Under fire policy exempting insurer from loss occasioned by locomotives insurer was liable for fire communicated from building on a building on right of way, though such building was set on fire by sparks from locomotive; the exempting clause contemplating a fire directly caused by sparks from a locomotive. Montgomery et al. vs. Southern Mut. Ins. Co. (Pa.).....	260
(3) Under fire policy exempting insurer from loss occasioned by locomotives insurer was liable for fire communicated from building on a building on right of way, though such building was set on fire by sparks from locomotive; the exempting clause contemplating a fire directly caused by sparks from a locomotive. Montgomery et al. vs. Southern Mut. Ins. Co. (Pa.).....	260

(C) GUARANTY AND INDEMNITY INSURANCE.

Liability policy covering saw mill, planing mill, etc. etc., does not cover the risk incurred in employment of mill hands in the boring of an artesian well for the obtention of water. Rust Lumber Co. vs. General Accident, Fire & Life Assur. Corp., Ltd. (La.).....	481
Liability insurance. Insurer was liable only for injuries for which plaintiff was contingently liable as owner, and not for injuries for which he was directly liable, as doer or causer of the negligent act, since a "contingent liability" is one depending upon an uncertain event. American Cereal Co. vs. London Guarantee & Accident Co. (U. S.)	834

(D) LIFE INSURANCE.

(2) There may be recovery on policy insuring against death from bodily injuries "by violent and accidental means, suicide (sane or insane) not included". If the insured was so insane he did not know he was taking his life, but that his act would probably result in death. Vicars vs. Aetna Life Ins. Co. (Ky.)	661
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(E) ACCIDENT INSURANCE.

A showing that deceased was killed in an affray with a burglar would establish accidental death, unless death from such cause is exempted. Allen vs. Travelers' Protective Assn. of America (Iowa)	89
The beneficiary of one killed while attempting to board a street car, but who had not become a passenger, could not recover. Mitchell vs. German Commercial Accident Co. (Mo.).....	271
Held, that if engineer's condition could be ascertained by observation or examination it was "visible injury" within the meaning of the by-law. Peterson vs. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n (Minn.).....	268

One insured as a financial writer and reporter engaged, when injured, in testing and trying out in the air a flying machine, was not engaged in recreation. The company's liability shall only be such proportion as the premium paid will purchase at the rate for the more hazardous occupation. <i>Ridgely vs. Ætna Life Ins. Co. (N. Y.)</i>	503
Person who attempts to cross railroad track immediately in front of rapidly approaching train, exposes himself to an "obvious risk or obvious danger". Obvious danger is one that is plain and apparent to a reasonably observant person. The fact that insured may not have observed it is not material. <i>Combs vs. Colonial Casualty Co. (W. Va.)</i>	512
Not error to instruct jury: "In order for provision of accidental feature of policy which relieves company in case of voluntary exposure, to be an excuse from liability, three elements are essential: conscious knowledge of danger; intention or wilful exposure; unnecessary danger." <i>Empire Life Ins. Co. vs. Allen (Ga.)</i>	558
If holder of accident policy shot police officer and fled and was shot by officer not for purpose of arresting him, but to avenge his own injury, death was not direct and proximate result of insured's vicious conduct and insurer was liable. <i>Railway Mail Ass'n vs. Moseley et al. (U. S.)</i>	807

XIII. Extent of Loss and Liability of Insurer.

(A) MARINE INSURANCE.	
(2) Held, that the freight on the amount of lumber jettisoned in an effort to save vessel could be added to the expense of salvage and transhipment chargeable to the freight and if these items amounted to more than one-half the freightage insured, the insurer was liable, though the covering agreement provided that it was free from partial loss. <i>Victoria S. S. Co. vs. Western Assur. Co. of Toronto (Cal.)</i>	804
(4) "Average warranty" construed. <i>Pacific Creosoting Co. vs. Thames & Mersey Marine Ins. Co., Ltd. (U. S.)</i>	650
(B) INSURANCE OF PROPERTY AND TITLES.	
(3) Building destroyed by fire and could not be rebuilt. Held, loss to be computed by arbitrary rule of policy without taking into account time for proof of loss, time for removal of debris and delay incident to inclement weather occurring in the season following the fire. <i>Amusement Syndicate Co. et al. vs. Milwaukee Mechanics' Ins. Co. (Kan.)</i>	267
Policy that provided in case of loss that company should be liable for only such portion thereof as the amount insured by the policy should bear to the actual cash value of the policy was void under the statute. Since such provision forced insured to share his loss with the insurer and carry part of his own risk. <i>Alsop Process Co. vs. Continental Ins. Co. (Mo.)</i>	397
Held, that the automobile policy was one of indemnity to the assured only and that a third person injured through his negligence, who recovered judgment against him in an action by defendant, which judgment was wholly unpaid could not maintain a suit against an insurance company for specific performance to compel payment of amount of policy. <i>Van Reen vs. Ætna Life Ins. Co. (U. S.)</i>	525
On the facts stated, a policy for \$4,000, where there was a total loss, was a liquidated demand for that amount, though the property was only worth \$1,000, where insurance was not induced by any representation by insured. <i>Drummond vs. White-Swearingen Realty Co. (Tex.)</i>	800
Where property destroyed was insured for \$7,500 and there was no evidence of depreciation of value between date of policy and fire, the company would be estopped to deny that value of property was \$7,500. <i>City of Aurora vs. Firemen's Fund Ins. Co. (Mo.)</i>	789
Policy indemnifying against loss of rents caused by fire or lightning, covers period needed to place contract for repairs and not limited to time actually spent in making repairs. <i>Hartford Fire Ins. Co. vs. Pires (Tex.)</i>	842
(C) GUARANTY AND INDEMNITY INSURANCE.	
A paid surety on a building contractor's bond was not relieved from liability because of overpayment made by the obligee, either to the contractor or directly to the contractor's servants, where such payments were necessary to satisfy claims for labor and save the property from liens and therefore did not operate to the prejudice of the surety. <i>Manhattan Co., Inc. vs. U. S. Fidelity & Guaranty Co. (Wash.)</i>	536
On the facts stated, held, that the bond and renewal certificates constituted distinct liabilities rendering the guarantor liable during respective periods covered by the bond of the renewals up to	

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the amount of \$2,500 per annum. Alex. Campbell Milk Co. vs. United States Fidelity & Guaranty Co. (N. Y.).....	636
(D) LIFE INSURANCE.	
Held, on the facts stated that each policy year commenced on October 1st and not on January 1st, and hence company was entitled to deduct balance of premium for one year. Fidelity Mut. Life Ins. Co. of Philadelphia, Pa., vs. Zapp (Tex.).....	89
Burden showing waiver of forfeiture is on plaintiff. Ostmann vs. Supreme Lodge, Knights and Ladies of Honor (N. J.).....	165
Statute enters into and forms a part of every policy. Loan agreement void in so far as it attempted to contract in advance that the net value should be applied other than for the purchase of extended insurance. Where insured was not sufficiently informed of his rights, his failure to reply to a notice and protest against application of proceeds of net reserve to satisfaction of personal indebtedness was not in acquiescence by estoppel to such action by the company. Gillen vs. N. Y. Life Ins. Co. (Mo.).....	181
Indebtedness that insurer was entitled to deduct was not limited to unpaid premiums or loans obtained from company, but included any indebtedness of insured or beneficiary of insurer, however incurred, when issued subject to indebtedness of insured or beneficiary. Citizens' Nat. Life Ins. Co. vs. Rutherford (Ky.)..	586
(E) ACCIDENT INSURANCE.	
Liability of insurer for seventy-eight weeks was not defeated by a provision of the policy that in event of disability due to accident or illness resulting wholly or in part, directly or indirectly, from Bright's disease, the limit of liability should be an indemnity for not exceeding four weeks at the stipulated rate, where it did not appear that insured had Bright's disease for more than four weeks before his death. National Life & Accident Ins. Co. vs. O'Brien's Ex'x et al. (Ky.)	139
Total disability requires only such disability as prevents the performance of any substantial part of assured's duties. Heitner vs. Fidelity & Casualty Co. of N. Y. (Tex.).....	144
Insurer was liable if the disability was such as to prevent insured from prosecuting any kind of business pertaining to his occupation or to prevent him from doing all the substantial acts required of him in his business. National Life & Accident Co. vs. O'Brien's Ex'x et al. (Ky.)	180
The complaint in an action on a larceny insurance policy was fatally defective for not alleging that the property stolen was that covered by the policy. Krickl vs. Ocean Accident & Guar. Corp'n., Ltd. (N. Y.)	182
Proof that insured was "wholly and continuously disabled, suffering from walking typhoid fever" during a specified period for which indemnity was claimed was insufficient. No physician having called during two certain periods there could be no recovery. Brusac vs. Peerless Casualty Co. (Me.)	414
Aeronaut could recover only one-half weekly indemnity for injuries sustained while operating a flying machine. Ridgely vs. Etna Life Ins. Co. (N. Y.)	508
Only sick benefits will be paid for diseases such as peritonitis, unless there is an infection directly resulting from the accident. Pacific Mut. Life Ins. Co. vs. McCabe (Ky.)	507
"Entire" does not mean total blindness, but it is sufficient if the insured had practically lost the entire sight of the eye. International Travelers' Ass'n. vs. Rogers (Tex.).....	523
On a life and accident policy, held, that the fact that insured collected a disability benefit would not prevent a recovery by beneficiary for loss of his life. Pacific Mut. Life Ins. Co. vs. McCabe (Ky.).	567
Insured confined in sanitarium for tuberculosis was continuously confined in the house, though he took short daily walks. One unable to attend to his business as publisher, though he was able to go to his office a few times to give instructions, was totally disabled within provisions of a health policy. Great Eastern Casualty Co. vs. Robins (Ark.).....	680
Held, that the beneficiary was entitled only to the indemnity which the premium paid would purchase for the more hazardous occupation and that the fact that he was killed while off duty was immaterial in determining the amount of the indemnity. Provision in accident policy for a smaller indemnity in case insured is injured while engaged in an occupation more hazardous than that specified is reasonable, and will be enforced by the courts. Beane vs. Continental Casualty Co. (Miss.).....	831
Held, that assured, sustaining personal injury, was entitled to recover an amount based on an earning capacity of \$40 a month since "wages" which is compensation given to a hired person, does not include income. Reddick vs. Northern Accident Co. et al. (Mo.)	831

XIV. Notice and Proof of Loss.

(A) REQUIREMENT IN GENERAL.

- Held, delay of ten months in giving an accident insurance company notice of an accident is unreasonable per se, under a clause of the policy requiring notice to be given as soon as reasonably possible. It is a condition precedent to recovery on the policy. The fact that physicians who attended him attributed his condition to disease, and not to accident, does not excuse a failure to give the company notice of the accident as soon as reasonably possible. *Hefner vs. Fidelity & Casualty Co. of New York* (Tex.) 144
- Where a policy contains no specific time for notice of death to be given, but merely provides "due proof of death," notice of insured's death must be given within reasonable time, and where attorney was employed to make proofs of death and they were not furnished for almost thirty days it was inexcusable and notice was not given within reasonable time. *Metropolitan Life Ins. Co. vs. Frankel* (Ind.) 228
- Liability insurance. Held, that insurer was not relieved of liability because of such delay, since it was not until the amendment that any claim was made for damages covered by the policy and had the summons and complaint been forwarded to insurer, he would doubtless have returned them on the ground that the damages sought to be recovered were not covered by its policy. *Press Pub. Co. vs. General Accident, Fire & Life Assur. Corp. (N. Y.)* 639
- Horse insurance. Notice of illness or accident to insurer's local agent was sufficient, it being immediately forwarded to insurer. *National Live Stock Ins. Co. vs. Henderson* (Tex.) 681
- Notice of horse's death immediately thereafter was in compliance with policy where owner was unable to secure services of a veterinarian. *National Live Stock Ins. Co. vs. Henderson* (Tex.) 681
- Where H. was general agent of defendant casualty company, which had written casualty insurance for plaintiff corporation, of which H. was also a stockholder, director and general manager, his knowledge of happening of an accident for which plaintiff would be liable, not imputable to defendant so as to relieve plaintiff from complying with conditions. *Utica Sanitary Milk Co. vs. Casualty Co. of America* (N. Y.) 834
- (B) FORM, REQUISITES, AND SUFFICIENCY OF NOTICE AND PROOFS.**
- On the facts stated held, that the policy proved was not the policy alleged, and that the variance was fatal. *United States Health & Accident Ins. Co. vs. Savage* (Ala.) 518
- (C) EFFECT OF STATEMENTS AND PROOFS.**
- False swearing as to the loss, under the statute, to avoid the policy must have been knowingly and wilfully false. Instructions that false statements must have been made with knowledge of its falsity and "with intention of defrauding the company" are erroneous in adding the quoted qualification. *Willis et al. vs. Horticultural Fire Relief of Oregon* (Ore.) 407
- Policies become void for fraud or false swearing of insured whether before or after loss, but only when done wilfully and knowingly with intent to defraud. *Ward vs. Queen City Fire Ins. Co. of Sioux Falls*, S. D. (Ore.) 643
- (D) ESTOPPEL OR WAIVER AS TO NOTICE.**
- Provision requiring proofs of loss was waived where company on being notified of a loss immediately took the position that policy was not in force. *Linglebach vs. Theresa Village Mutual Fire Ins. Co. (Wisc.)* 56
- Where insurer denied liability except for a small amount which it tendered, such act was a waiver of formal notice of disability to which under other circumstances, insurer would have been entitled. *National Life & Accident Ins. Co. vs. O'Brien's Ex'x et al.* (Ky.) 189
- Provision requiring proofs within sixty days was waived by adjuster accepting a schedule and by retention of proof furnished after sixty days. *Curnen vs. Law Union & Rock Ins. Co., Ltd. (N. Y.)* 245
- Where one was recognized by defendant company as its representative and his testimony tended to confirm, latter could not sustain contention that he had no authority to waive a clause of policy. *Teasdale vs. City of New York Ins. Co. (Iowa)* 482
- Filing of proofs by defendant's agent, though without usual affidavit and communication from company that adjuster would take up the matter, constituted waiver of plaintiff's obligation to furnish verified proofs of loss. *Teasdale vs. City of New York Ins. Co. (Iowa)* 482
- Denial of liability on the ground that the accident was not covered by the policy. Failure to refer to failure to give required notice did not constitute a waiver. *Smith vs. Arkansas Nat. Ins. Co. (Ark.)* 517
- Where attorney without authority prepared proofs which were accepted by insurer and with latter's knowledge, examined insured under oath, insurer having acquiesced in his acts and accepted

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<p>XV. Adjustment of Loss.</p> <p>(A) ADJUSTMENT AND SETTLEMENT.</p> <p>Where an agent authorized to effect settlement of a claim, executed a note on defendant's behalf and received from plaintiff a release which defendant, though repudiating the settlement, refused to return until five or six months after knowledge of compromise, it thereby ratified compromise Roane vs. Union Pac. Life Ins. Co. (Ore.)</p>	634
<p>(B) APPRAISAL AND ARBITRATION.</p> <p>Where the agreed terms of submission of the amount of loss to appraisers indicated that the appraisers were to proceed informally and did not provide for notice to the insured, failure to give the insured notice of the meeting of appraisers or an opportunity to present evidence did not invalidate their award. Eberhardt vs. Federal Ins. Co. (Ga.)</p>	
498	
<p>Submission by agreement between insurer and insured to appraisers to fix the amount of "sound value and damages" was in accordance with the provisions of the policy authorizing submission of the "amount of loss" to appraisers; the phrases quoted being synonymous. Eberhardt vs. Federal Ins. Co. (Ga.)</p>	
499	
<p>Where a matter at issue between two parties is submitted to third persons and they render an award which does not exceed their authority, they will not be heard to impeach the regularity of fairness of their findings. Purpose of submission to appraisers was to affix the amount of the loss. Plaintiff's loss represented the difference between value of the property before the fire and its value immediately thereafter. The effect of the award was to affix the amount of the plaintiff's loss. It was unambiguous, was in strict accordance with the agreement of submission, and was binding upon the parties. Such an award selected pursuant to fire insurance policy may be set aside, under the code for fraud or by showing that unfair advantage had been given to one of the parties or for a palpable mistake of law. Eberhardt vs. Federal Ins. Co. (Ga.)</p>	
499	
<p>Agreement to submit amount of loss to appraisers contemplates making of an appraisal and also an award. Riddell vs. Rochester-German Ins. Co. of New York (R. I.)</p>	
644	
<p>Appraisal need not be conducted with formality of trial court, but there must be a fair effort to ascertain the truth, etc. Appraisers should call in an umpire on disagreement, whose function is to deliberate with them, it being improper for one or two to consider evidence not submitted to the other or others. J. E. Davis Mfg. Co. vs. Firemen's Fund Ins. Co. et al. (U. S.)</p>	
621	
<p>In accordance with the terms of the policy the award of the appraisers was conclusive on both parties and fixed the amount of the insured's liability. Commercial Union Assur. Co., Ltd. vs. Dalzell—London & Lancashire Fire Ins. Co. vs. Same (U. S.)</p>	
607	
<p>Appraisers and umpire should be competent, fair and unprejudiced. Refusal to consider material sworn statements is evidence of bias and interest. Award set aside for fraud. J. E. Davis Mfg. Co. vs. Firemen's Fund Ins. Co. et al. (U. S.)</p>	
621	
<p>Award of appraisers must conform in substance and form to the agreement for submission to them. Riddell vs. Rochester-German Ins. Co. of New York (R. I.)</p>	
644	
<p>If arbitration is agreed on and appraisement has failed, without the fault of either party, insured cannot be required to select another arbitrator. St. Paul Fire & Marine Ins. Co. et al. vs. Kirkpatrick et al. (Tenn.)</p>	
798	
<p>Upon filing of a bill by insurance company to set aside award, court acquired jurisdiction of controversy, and could set aside award and enforce policies under cross-bill without selection of new arbitrators. St. Paul Fire & Marine Ins. Co. et al. vs. Kirkpatrick et al. (Tenn.)</p>	
798	
<p>If insured fails to agree to arbitration, he cannot sue and if unreasonably persisted in, forfeits policy and if company refuses such a demand, insured may sue at once. If arbitration fails because of fraud or intermeddling by insured, he cannot sue on policy; and if it fails by fraud, etc., of company, insured may abandon arbitration and sue on the policy. St. Paul Fire & Marine Ins. Co. et al. vs. Kirkpatrick et al. (Tenn.)</p>	
798	
<p>(C) ESTOPPEL OR WAIVER AS TO ADJUSTMENT OR ARBITRATION.</p>	
<p>Held, that upon failure of parties to agree as to loss in accordance with provisions of standard fire policy, the neglect of the insurer to appoint referees, after receiving insured's letter stating that he</p>	

was ready to proceed, did not establish a waiver of the right to a reference. <i>Vera et al. vs. Mercantile Fire & Marine Ins. Co.—Vera vs. Merrimack Mutual Fire Ins. Co.—Vera et al. vs. Michigan Fire & Marine Ins. Co. (Mass.)</i>	59
Failure to object to evidence at the time it was offered is a waiver of the objection. <i>Douville vs. Pacific Coast Casualty Co. (Idaho)</i> ..	518

XVI. Right to Proceeds.

(A) INSURANCE OF PROPERTY.

(1) A purchaser under a valid contract becomes the equitable owner of the land, the vendor retaining the legal title simply as trustee. <i>Millville Aerie No. 1836, Fraternal Order of Eagles, vs. Weatherby et al. (N. J.)</i>	54
Failure to object to evidence at the time it was offered is a waiver of the objection. <i>Douville vs. Pacific Coast Casualty Co. (Idaho)</i> ..	518
(2) It appearing from evidence, without contradiction, that the assignment in question was made upon a valuable consideration and that the defendant, whose debt to the assignor, was the subject of the assignment, paid the debt to the assignor, without the consent of the plaintiff and after notice of the assignment, the court did not err in directing a verdict for the plaintiff. <i>Metropolitan Life Ins. Co. vs. Lewis (Ga.)</i>	311
Loan—defendant—reinstatement—assignment to third party. <i>C. E. Shepard & Co. vs. New York Life Ins. Co. (Conn.)</i>	355
Where life policy was payable in cases of death to wife, or insured if living, insured upon becoming bankrupt before maturity of policy was without right to deprive beneficiary of provision then existing in her favor or to obtain benefits thereunder by surrender or by other arrangements to which she did not assent. Wife's rights as beneficiary are exempt from interference or control by him both under the general law and by Wm. Statute. In Re Churchill—Churchill et al. vs. Bestul (U. S.).....	437

(B) LIFE AND ACCIDENT INSURANCE.

(1) The code provides that the word "heirs" or "legal heirs" or their equivalents, used to designate beneficiaries in the absence of a contrary intention, shall include a surviving husband or wife of the insured, who shall receive the same proportion of the proceeds as that provided by law. Held, that while such section is prospective in operation only, it is nevertheless applicable to a policy issued before its enactment where insured died subsequent thereto. <i>Thompson et al. vs. Northwestern Mutual Life Ins. Co. (Iowa)</i> ... The fact that insured died before the change of beneficiaries was endorsed on policies did not defeat the right of the new beneficiary under the clause of the policy that the change should not become effective until it was endorsed on the policy, since former beneficiaries had acquired no vested interest therein. <i>Pierce vs. N. Y. Life Ins. Co. (Mo.)</i>	87
The rule that one who insures his own life for the benefit of another and pays the premiums himself, may at any time dispose of policy or will it away without the beneficiary's consent was changed, so far as married women were concerned, by statute so as to provide that a policy payable to a married woman or assigned to her, or to a trustee for her benefit, should be her sole and separate property, free from the control, disposition or claims of her husband. <i>Boehmer et al. vs. Kalk et al. (Wis.)</i>	46
Provision in a life policy that no assignment of interest should bind insurer unless its written consent was endorsed thereon did not render ineffective a change of beneficiary made by assured in his will; word "assignment" as used in the policy not equivalent to or inclusive of a "change of beneficiaries." Where it was silent as to method of changing the beneficiary, provision in insured's will making such change was valid. <i>Townsend vs. Fidelity & Casualty Co. of New York (Sower, Intervener)—Ellis vs. Same (Hall, Intervener) (Iowa)</i>	216
Beneficiary of a life policy acquires no such rights therein as can prevent insured from substituting another beneficiary at will where policy reserves such right. <i>Townsend vs. Fidelity & Casualty Co. of New York (Sower, Intervener)—Ellis vs. Same (Hall, Intervener) (Iowa)</i>	279
Where it appeared that assured's mother had never been the legal wife of a certain person by a common law or ceremonial marriage, there was no presumption of law that such person was assured's father, and the burden of proving that fact by preponderance of the evidence was upon the person asserting it to defeat a life insurance policy. <i>Mutual Life Ins. Co. of New York vs. Good (Colo.)</i>	226
Beneficiary—divorce—right to proceeds. <i>Filley vs. Illinois Life Ins. Co. et al. (Kan.)</i>	359

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- Insured's wife, named as beneficiary in life policy which reserves the right to change beneficiary at will, had no right to possession of policy as against insured. John Hancock Mut. Life Ins. Co. vs. Bedford et al. (R. I.) 378
- Where insured attempted to change beneficiary without surrendering policy for endorsement by officers as stipulated and after his death company filed bill of interpleader to determine whether funds should be paid to original or substituted beneficiary, it thereby waived its objections to the change. Where beneficiary refused to surrender possession of policy delivered to her for safe keeping and insured filed with company a notice attempting to change beneficiary and company made no objection, in fact waived the provision as to endorsement by filing a bill of interpleader after insured's death, the change was effected and the substituted beneficiaries were entitled to the fund. Where a policy authorizes insured to change beneficiary from time to time payment of premiums thereon by beneficiary did not affect her rights. John Hancock Mut. Life Ins. Co. vs. Bedford et al. (R. I.) 378
- Under policy made payable to wife or her assigns without qualification contingent upon her surviving insured, whether contract was governed by the Laws of New York or Connecticut, in absence of inconsistent language, beneficiary takes a vested interest which passes at death to her legal representatives and which after delivery of policy cannot be divested by insured, the insurer or both. C. E. Shepard & Co. vs. New York Life Ins. Co. (Conn.) .. 355
- Beneficiary in a life policy which provided for a change of beneficiary at will acquires no vested interest preventing insured from making change whenever he desires to do so. John Hancock Mut. Life Ins. Co. vs. Bedford et al. (R. I.) 378
- Clause in an industrial policy that a production by the company of policy and receipt for sum assured signed by an executor, husband, blood relative, or lawful beneficiary of deceased shall be conclusive evidence of payment to the person lawfully entitled, would not affect rights of beneficiary named in the policy or permit a change of beneficiary without consent of original beneficiary. Wachtel vs. Harrison (N. Y.) 452
- In the absence of provision for change of beneficiary, beneficiary acquires a vested interest and where policy provides for a change, a beneficiary's interest, while subject to be defeated, can be defeated only in the manner prescribed in the policy. Failure of insured to comply with the regulation of giving home office notice of change of beneficiary cannot be excused because he was an ignorant foreigner, it appearing that he recognized the conditions by attempting at one time to comply with them. Johnson vs. N. Y. Life Ins. Co. (Colo.) 456
- Policy containing option to change beneficiary vests the property in insured and is liable for his debts. Jacobs vs. Strumwasser (N. Y.) 450
- Paper signed by decedent purporting to change the beneficiary in industrial policy would not have that effect if it was not consented to by original beneficiary in absence of clause permitting such change. Wachtel vs. Harrison (N. Y.) 452
- Where a husband insures for benefit of his wife by ordinary life policy, the property in the policy vests at once in the beneficiary. Jacobs vs. Strumwasser (N. Y.) 450
- "Legal representatives" meant insured's executors or administrators and not next of kin. Quick et al. vs. Quick (N. Y.) 707
- (B) In the absence of beneficiary option, life policy not controlled by general code, Ohio, § 9398, and was not such a policy as would pass insured's contingent interest to his trustee in bankruptcy. Held, that the policies having a cash surrender value, payable to the bankrupt's wife whether he had the right to change the beneficiary or not, were exempt and not assets passing to trustee. In re Young (U. S.) 155
- It appearing from evidence, without contradiction, that the assignment in question was made upon a valuable consideration and that the defendant, whose debt to the assignor, was the subject of the assignment, paid the debt to the assignor, without the consent of the plaintiff and after notice of the assignment, the court did not err in directing a verdict for the plaintiff. Metropolitan Life Ins. Co. vs. Lewis (Ga.) 211
- Loan—defendant—reinstatement—assignment to third party. C. E. Shepard & Co. vs. New York Life Ins. Co. (Conn.) 355
- Exemption of proceeds of life policy from debt under statute extends only to debts of insured and not to beneficiary. Reiff vs. Armour & Co. (Wash.) 738
- (C) INDEMNITY INSURANCE.
- A guarantee company held not liable as garnishee upon a judgment against assured and an indemnified risk. Truan vs. Range Power Co. et al. (Minn.) 431
- Surety insurance. Held, that such provision of the bond was for the indemnity and benefit of the surety as well as the owner and the latter's failure to comply thereto constitutes a material variance.

which relieved the surety from liability without proof of actual injury therefrom. *Justice vs. Empire State Surety Co. (U. S.)* 422

(D) ACTIONS TO DETERMINE RIGHTS TO PROCEEDS.

The code provides that the word "heirs" or "legal heirs" or their equivalents, used to designate beneficiaries in the absence of a contrary intention, shall include a surviving husband or wife of the insured, who shall receive the same proportion of the proceeds as that provided by law. Held, that while such section is prospective in operation only, it is nevertheless applicable to a policy issued before its enactment where insured died subsequent thereto. <i>Thompson et al. vs. Northwestern Mutual Life Ins. Co. (Iowa)</i> ... It appearing from evidence, without contradiction, that the assignment in question was made upon a valuable consideration and that the defendant, whose debt to the assignor, was the subject of the assignment, paid the debt to the assignor, without the consent of the plaintiff and after notice of the assignment, the court did not err in directing a verdict for the plaintiff. <i>Metropolitan Life Ins. Co. vs. Lewis (Ga.)</i> Loan—defendant—reinstatement—assignment to third party. <i>C. E. Shepard & Co. vs. New York Life Ins. Co. (Conn.)</i> Where award of appraisers is invalid, it is duty of insured and not insurer to take steps to procure new award. <i>Riddell vs. Rochester-German Ins. Co. of New York (R. I.)</i> "Legal representatives" mean insured's executors or administrators and not next of kin. <i>Quick et al. vs. Quick (N. Y.)</i>	37 211 355 644 707
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XVII. Payment or Discharge, Contribution, and Subrogation.

(A) PAYMENT OR DISCHARGE.

Where insurance company sent to beneficiary check for amount due which was retained without objection except an unfounded objection that it was insufficient in amount, this constituted a sufficient tender and prevented recovery of interest. <i>Fidelity Mut. Life Ins. Co. of Philadelphia, Pa., vs. Zapp (Tex.)</i> Held, that the failure to settle the loss was neither unjustifiable nor vexatious so as to render defendant liable to a penalty and for plaintiff's attorney's fees. <i>Patterson vs. American Ins. Co. of Newark, N. J. (Mo.)</i> In an action on a life policy where insured vexatiously refused to satisfy the policy and award of \$100 attorney's fees does not show passion or prejudice on the part of the jury where there was testimony authorizing such an award even though the amount of the policy was less than \$100. <i>Buchholz vs. Metropolitan Life Ins. Co. (Mo.)</i>	39 75 50
The subrogation clause being inserted by the insurer for the protection of the insurer is to be construed most strongly against the insurer and in favor of the insured. In view of the facts disclosed, the court could not by way of purely legal construction give the stipulation the effect which the defendant claimed for it and void the policy. <i>Ensel vs. Lumber Ins. Co. of New York et al. (Ohio)</i>	60
Generally a recovery by insured from a third person causing a loss of the property insured, releases insurer from liability. <i>Weaver vs. N. J. Fidelity & Plate Glass Ins. Co. (Colo.)</i> The filing of the bill was a sufficient demand, and the filing of the answers, denying liability, a refusal to pay as regards right to recover penalty on the additional losses. <i>Thompson vs. Interstate Life & Accident Co. (Tenn.)</i>	307 418
Held to obligate defendant to make monthly payments of indemnity during the disability of the insured, not exceeding the period covered by the policy. <i>Zeitler vs. National Casualty Co. (Minn.)</i> In view of the statute permitting amount to be added for vexatious refusal to pay, "not to exceed" 10 per cent "of the loss," it was error to permit an allowance fixed at "10 per cent of policy." <i>City of Aurora vs. Firemen's Fund Ins. Co. (Mo.)</i>	522 789
Under statute providing that insurance companies which refuse to pay loss within sixty days shall be liable for an additional 25 per cent for vexatious delay; a formal demand for payment must be made by insurer after maturity of policy and if not complied with, insured may sue on policy or award and recover the penalty. The date of maturity if no demand made for arbitration would occur at expiration of number of days fixed in policy; but if policy provides for payment a certain number of days after filing award, the date of maturity would be governed accordingly. Statute imposing penalty for refusing to pay is penal and must be strictly construed. <i>St. Paul Fire & Marine Ins. Co. et al. vs. Kirkpatrick et al. (Tenn.)</i>	798

(C) SUBROGATION.

Under a tourist policy providing that if the insured acquired a right of action he should assign or transfer it to insurer upon payment of loss, the insurer who did not show that payment to insured by

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a hotel was for loss by fire, was not entitled to subrogation.	
Providence Washington Ins. Co. of Providence, R. I. vs. Youmans (N. Y.)	90
Insurer may, upon paying fire loss, sue the person negligently causing the fire and retain from the amount recovered the sum paid to insured, and turn the balance over to him or insured may himself sue the wrongdoer for his own benefit and that of the insurer. Coffman vs. Louisville & N. R. Co. (Ala.).....	254
Where insurance companies which have paid policies on property destroyed caused by negligence of third person and have by equitable principles been subrogated to right of action by owner, may maintain an action thereon in their own name under the Laws of Washington. Palmer et al. vs. Oregon-Washington R. Railroad company's liability to insurance company was the actual value of the property destroyed at the time of fire and not its insured value since it was not party or privy to contract. Globe & Nav. Co. (U. S.).....	230
& Rutgers Fire Ins. Co. vs. Chicago & A. R. Co. (Mo.).....	267
Where insurer undertakes to indemnify insured with full knowledge of an antecedent settlement between him and third person, insurer is a mere volunteer and cannot recover from insured under subrogation clause. Weaver vs. N. J. Fidelity & Plate Glass Ins. Co. (Colo.).	307
Held, that mortgagee clause did not vest in the insurer right to subrogation on a mere assertion of an unfounded claim, that it was not liable to the mortgagor and hence on tender of the mortgage debt, it was not entitled to subrogation nor to an assignment of the mortgage where it only failed to prove its non-liability to the mortgagor, but suffered judgment in his favor. O'Neill vs. Franklin Fire Ins. Co. of Philadelphia et al. (N. Y.)..	388
Held on the facts stated that such payment did not constitute a payment of the insurance so as to subrogate the insurer to the rights of plaintiff's assignor, and that an action against the carriers was properly brought by plaintiff. Lee vs. Barrett et al. (N. Y.)	426
Subrogation—insurer's right is limited by rights of insured against the tort-feasor. Where owner collects damages for negligence of railroad company, insurer cannot maintain an action against latter to compel him to make good its loss. Company's right of subrogation to owner's cause of action accrued, for purpose of determining the bar of limitations at time of loss and not at time of payment of policy. Where railroad paid for destruction of insured property only at end of law suit wherein judgment had been pronounced against it in favor of insured, such payment was not in fraud of insurer, even though it had paid the loss. Fidelity Ins. Co. et al. vs. Atlantic Coast Line R. Co. (N. C.)....	640
Rights of lienholder were not affected by payment of premiums by mortgagor. Subrogation clause intended to cover mechanics' lien. Washington Fire Ins. Co. et al. vs. Cobb et al. (Tex)....	647
Insurer becomes subrogated to any rights of insured as against third person. Held, insurance company became equitable assignee of right of action against railroad, the legal title remaining in the insured, who could not compromise without consent of company. Insurance company after paying loss, has right of subrogation regardless of whether there is subrogation clause in policy. Fire Ass'n of Philadelphia vs. Schellenger (N. J.).....	792
Where insurer pays loss occasioned by negligence, it becomes entitled to subrogation by operation of law, and subrogation receipt or other agreement is unnecessary. Held, on the facts stated, that as defendant settled claim without complainant's knowledge and did not notify it of the giving of a release which was a <i>prima facie</i> bar, complainant is entitled to hold defendant as trustee for amount of loss which it paid. Fire Ass'n of Philadelphia vs. Wells (N. J.)	793
Insurer on paying mortgagee's claim is entitled to subrogation. Rawls vs. American Central Ins. Co. (S. C.)	795

XVIII. Action on Policies.

(A) RIGHT OF ACTION AND DEFENSES.

Held, on the facts stated, that the letter was not a total repudiation of the contract or a denial of all liability by the company but only a denial of liability under the policy for loss of an arm. Indiana Life Endowment Co. vs. Reed (Ind).....	123
Cyclone policy. Held, that regardless of whether plaintiff had refused to submit question of damage to arbitration, the insurer's right to arbitration was waived. Beyer vs. Minnesota Farmers' Mut. Ins. Co. (Minn.)	503
No suit could be lawfully brought on policy until amount to be sued for had been determined by appraisement. Commercial Union Assur. Co., Ltd. vs. Dalzell—London & Lancashire Fire Ins. Co vs. Same (U. S.)	607

Where mortgagee had no knowledge of failure to procure a valid arbitration as required or mortgagor's failure to procure new appraisal, neglect of mortgagor would not prevent mortgagee from maintaining an action on policy; the words "the insured" referring to the mortgagor. <i>Riddell vs. Rochester-German Ins. Co. of New York (R. I.)</i>	644
Refusal of insured to submit to an examination under oath does not forfeit or avoid contract and bar recovery, but merely suspends right of recovery until compliance. <i>Aachen & Munich Fire Ins. Co. vs. Arabian Toilet Goods Co. (Ala.)</i>	634
Rescission is not exclusive remedy of an insurer who has written a policy in favor of one who conceals matter affecting risk, but insured may seek affirmative relief in court of equity. <i>California Reclamation Co. vs. New Zealand Ins. Co. (Cal.)</i>	654
If insured fails to agree to arbitration, he cannot sue and if unreasonably persisted in, forfeits policy and if company refuses such a demand, insured may sue at once. If arbitration fails because of fraud or intermeddling by insured, he cannot sue on policy; and if it fails by fraud, etc., of company, insured may abandon arbitration and sue on the policy. <i>St. Paul Fire & Marine Ins. Co. et al. vs. Kirkpatrick et al. (Tenn.)</i>	798
(B) JURISDICTION AND VENUE.	
Provision in an "underwriters' policy" as to maintenance of suit does not of itself subject the several underwriters to the jurisdiction of the courts other than those of their domiciles, nor does it obligate them to subject themselves to the jurisdiction of such courts. <i>Reynolds et al. vs. Globe Fire Underwriters of St. Louis, Mo., et al. (La.)</i>	498
(C) TIME TO SUE AND LIMITATIONS.	
(1) Held, that the limitation in the standard fire policy with reference to the commencement of suit runs from date of fire and cannot be extended to twelve months succeeding the sixty days from the time of furnishing proofs of loss. <i>Dahrooge et al. vs. Rochester-German Ins. Co. of Rochester, N. Y. (Mich.)</i>	95
Held, on the facts stated, to show that disability of the insured resulting from the accident, while total within the meaning of the policy, was not immediate. <i>Hefner vs. Fidelity & Casualty Co. of New York (Tex.)</i>	146
Unnecessary for the reply to deny an allegation of the answer that the disability was not continuous from the date of accident to the time of death. <i>National Life & Accident Ins. Co. vs. O'Brien's Ex'x et al. (Ky.)</i>	130
If death is shown to have resulted from an external or visible injury it will be presumed that it was not intentionally inflicted by the insured or third person. Not improper to charge that insurer had the burden of proving that the injury was intentionally inflicted. <i>Allen vs. Travelers' Protective Assn. of America (Iowa)</i>	90
Evidence held, to show that insured was wholly and continuously disabled. <i>National Life & Accident Ins. Co. vs. O'Brien's Ex'x et al. (Ky.)</i>	130
Burden of Proof on company to show that insured was ill from a progressive disease when he took out policy. <i>Roedel vs. John Hancock Mut. Life Ins. Co. (Mo.)</i>	48
In an action on a life policy where medical examiner's statements were in conflict with those of physician who furnished proofs of death the question is for the jury. <i>Buchholz vs. Metropolitan Life Ins. Co. (Mo.)</i>	60
Instruction that misrepresentation must be material was not erroneous to defendant's prejudice. <i>Roedel vs. John Hancock Mut. Life Ins. Co. (Mo.)</i>	48
Question as to time contract of insurance went into effect properly submitted to jury, and finding that it went into effect at the time of delivery and was not postponed until five days later, is not contrary to law. Held, it was for the court to say whether his failure to mention a release given to a railroad etc., was a material concealment. <i>Ensel vs. Lumber Ins. Co. of New York et al. (Ohio)</i>	60
Evidence that an attorney was prevented by an injury from doing anything that required continual physical effort is sufficient to take to the jury the question whether his disability was total. <i>Hefner vs. Fidelity & Casualty Co. of N. Y. (Tex.)</i>	144
Instruction in an action on a fire policy that insurer would not be relieved by the fact that the fire occurred through negligence of plaintiff or his tenant, is in conformity to the code declaring that an insurer is not exonerated by the negligence of the insured, or his agents or others. <i>O'Neill vs. Union Assur. Society, Ltd. Same vs. Law Union & Rock Ins. Co., Ltd. (Cal.)</i>	72
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(8) In an action on an accident policy providing a death benefit in case of a member in good standing, by accident, insurer must plead as an affirmative defense the rule of the association exempting it from liability for intentional injuries causing death inflicted by the member or any other person, and so it has the burden of proving such defense. Allen vs. Travelers' Protective Assn. of America (Iowa)	99
Where insurer, by a policy providing that loss should be payable to mortgagee, as interest should appear, with subrogation to the rights of mortgagee, after commencement of action by owner, paid full amount to mortgagee and by answer, set up among other things, the fact of such payment as a complete defense which, if established, would bar recovery, it was proper to compel plaintiff to reply thereto. McArdle et al. vs. Royal Ins. Co., Ltd. (N. Y.)	248
Held, on a credit policy that the word "losses" as used in application was not equivalent to insolvency and in an action where the defense was a breach of warranty, a burden was on the defendant to establish, not only the insolvency of a debtor not mentioned in the application, but to prove that plaintiff knew at the time the application was made that he would ultimately suffer a loss upon such debtor's account. L. Black Co. vs. London Guarantee & Accident Co., Ltd. (N. Y.)	301
Evidence held to show that insurer was not harmed by inadvertent description of brokers. Curnen vs. Law Union & Rock Ins. Co., Ltd. (N. Y.)	266
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Where it was a question of fact whether the policy in the record was the one issued, the question was properly submitted to the jury. International Order of Twelve Knights & Daughters of Tabor vs. Denman (Tex).....	318
Whether misrepresentation is material, whether it increases risk, whether it is made with intent to deceive and defraud, are usually questions of fact for jury with burden of proof upon the insurer; but they may be for the court. Johnson vs. National Life Ins. Co. (Minn).	283
What is reasonable time for giving notice of proof of death ordinarily depends upon the circumstances of the particular case but if the delay is considerable and unexplained, and the facts are undisputed whether notice had been given within reasonable time is a question of law for the court. Metropolitan Life Ins. Co. vs. Frankel (Ind)	288
Where defense on a fire policy was that the policy had been canceled by notice accepted by insured's agent and there was no evidence that the agent had any authority other than to procure the policy, which was delivered to him unconditionally, a peremp-	

tory instruction was properly given for the plaintiff firm; the fact that insured's agent has authority to procure an insurance policy creating no presumption that the agent has authority to accept notice of cancellation. <i>Dixie Fire Ins. Co. vs. A. Layne & Bro. (Ky.)</i>	268
Where insured directed cancellation and agent instead of canceling, wrote him concerning reason why they were obliged to charge an increased premium and stated policy would be canceled if he matter of law, that insured's letter operated as a cancellation without action on part of insurer. <i>National Union Fire Ins. Co. vs. Akin (Tex.)</i>	264
Where company gave notice of cancellation but did not attend to the unearned premium and assured did not object or request return but thought policy was canceled and procured other insurance, it was a question for the jury whether policy was canceled by mutual consent. <i>Polemanakos vs. Austin Fire Ins. Co. (Tex.)</i>	266
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Where suit to reform and enforce a fire policy is not commenced within five years from the accrual of right of action or within one year for judgment at law for plaintiff has been reversed, the suit is barred by the statute of limitations. <i>Erickson vs. Insurance Co. of North America et al. (Fla.)</i>	408
Under statute suit must be delayed sixty days after demand only when the company does not answer the demand within that time, and the refusal being sooner, suit may be commenced immediately thereafter. <i>Thompson vs. Interstate Life & Accident Co. (Tenn.)</i>	410
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Evidence held to warrant a finding that defendant was estopped by acts of its cashier to claim a forfeiture. <i>Lange vs. N. Y. Life Ins. Co. (Mo.)</i>	368
It is presumed that an award of appraisers as to value of insured property destroyed was just and proper. <i>J. E. Davis Mfg. Co. vs. Stuyvesant Ins. Co. et al. (N. Y.)</i>	383
Where plaintiffs proved that employee collected and failed to pay over a certain sum and after demand therefor disappeared and was arrested only after diligent search and defendant offered no evidence, it was error to dismiss the complaint. <i>Marcus et al. vs. Fidelity & Deposit Co. of Maryland (N. Y.)</i>	485
Instruction that mere notification to insurer of a transfer was not sufficient to change character of statement in the policy, that notification on the part of insured, and assent thereto on the part of the insurer was required and that if notification was given by insured and received by insurer, assent would be presumed unless insurer declined to accept transfer so made, was correct and not erroneous, as placing burden on insurer to prove its nonconsent, not contradictory. <i>Northern Assur. Co. Ltd. of London et al. vs. Morrison (Tex.)</i>	409

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Provision of assessment policy exempted liability for death caused by discharge of firearms unless accidental character thereof be established by the testimony of one eye-witness other than a member. Held, that its purpose was to remove the presumption of accident, although not necessarily requiring that the witness should have seen the exact manner of discharge, it did require his presence at or near the scene and his direct observation of such facts as of or near the scene and his direct observation of such facts as of themselves would indicate that the shooting was accidental. Under the evidence held insufficient to show that insured's death caused by gun-shot wound was accidental. <i>Roch vs. Business Men's Protective Ass'n of Des Moines (Iowa)</i>	519
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In absence of statute, or conditions in policy authorizing taxing of attorney's fees, same cannot be recovered. St. Paul Fire & Marine Ins. Co. vs. Peck (Okla.)	649

XIX. Reinsurance.

Insurer may show that the manual delivery of the policy was conditional or it may prove fraud or other equitable matter to show that it never took effect as a contract, but when once delivered and policy becomes effective, statements therein which, if falsified, will affect its continued validity cannot be contradicted with a view to avoid the insurance. <i>Gardner vs. North State Mut. Life Ins. Co. (N. C.)</i>	85
Insurance company insured the insured against injury from 1904 to 1909, but each year issued a new policy based upon new application. A reinsurance company issued separate contracts for each of policies issued; such contracts being based upon policy and application for that particular year. Held, that each policy was a new, separate, and independent contract, and likewise each reinsurance contract constituted also a new contract to be read with the application and policy for that year. <i>Casualty Co. of America vs. United States Casualty Co. (N. Y.)</i>	828
Reinsurer. Held, not to sustain a finding that a clause exempting re-insurer from liability for accidental injuries occurring to insured while on a trip to Alaska was omitted from the reinsurance contract by mistake. <i>Casualty Co. of America vs. United States Casualty Co. (N. Y.)</i>	828

XX. Mutual Benefit Insurance.

(A) CORPORATIONS AND ASSOCIATIONS.

(1) While the plan of an unincorporated insurance association cannot affect third persons, yet, in fixing the legal status of its members such plan may be examined to ascertain the nature of the association. An unincorporated insurance association, while providing the way to secure cheaper insurance, was also for mutual profit and advantage, and not merely for benevolent, charitable, etc., purposes, though the plan contemplated the nonaccumulation of profits. <i>Sergeant vs. Goldsmith Dry Goods Co. et al. (Tex.)</i>	85
Insurer may show that the manual delivery of the policy was conditional or it may prove fraud or other equitable matter to show that it never took effect as a contract, but when once delivered and policy becomes effective, statements therein which, if falsified, will affect its continued validity cannot be contradicted with a view to avoid the insurance. <i>Gardner vs. North State Mut. Life Ins. Co. (N. C.)</i>	85
St. Louis Police Relief Association is neither a public nor quasi public corporation, but a private corporation, the organization of which is specifically authorized by statute to create a special fund for specific purposes, which fund is private, and does not in any sense belong to the public. <i>De Runtz vs. St. Louis Police Relief Ass'n (Mo.)</i>	467
The fact that fraternal association offered to its members only a small prize for procuring new applications for membership was not a "payment of commissions or employment of agents" within statute. <i>Finch vs. Bond et al. (Ky.)</i>	722
(2) Any agreement between members of an unincorporated insurance association limiting their liability would no more affect third persons than a similar agreement in an ordinary partnership. The rights and liabilities of the members of such association, as between themselves, are governed by provisions of the application for insurance and the policy contract issued thereon. This plan is based on principle of agency, and a corporation cannot escape liability on the ground that it could not become a member of a partnership, for, while the liability is similar to liability of partners, the arrangement did not constitute a copartnership. <i>Sergeant vs. Goldsmith Dry Goods Co. et al. (Tex.)</i>	85
Knowledge of local officer of association that insured was in arrears when reinstated charged the association with such knowledge. <i>Keyes et al vs. National Council, Knights & Ladies of Security (Mo.)</i>	200
In absence of statute insurance companies may limit the authority of their agents and an applicant dealing with an agent whose authority is expressly limited by the application cannot take advantage of any act of the agent in excess of limited authority. <i>Modern Woodmen of America vs. International Trust Co. (Colo.)</i>	338
Notwithstanding unfavorable report as to insured's condition association issued policy. Held, it was estopped thereafter to defend an action on the policy because of alleged untrue statements concerning insured's health. Medical examiner's knowledge of insured's previous rejection was knowledge of defendant. <i>Masonic Life Ass'n vs. Robinson (Ky.)</i>	218
The fact that agent of fraternal society was informed by other persons that insured was "too much of a drinker" etc., were mere vague opinions and not sufficient to charge the agent with the duty of	

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Investigating the extent of insured's indulgence. Where insured's misrepresentations to agent were wilful, the fact that the agent knew that insured's statements were not true would not estop company from avoiding certificate on that ground since there can be no estoppel unless one of the parties is misled to his disadvantage. <i>Modern Woodmen of America vs. International Trust Co. (Colo.)</i>	228
Subordinate lodge of a benefit association authorized to receive or collect dues and transmit them to the association, is the agent of the association for that purpose, whose acts within the scope of its agency are binding and the association cannot deny its agency within the scope of such authority. <i>Dromgold vs. Royal Neighbors of America (Ill.)</i>	176
Unless contract otherwise provides, member may withdraw from it at any time without consent of association. <i>Kelly et al. vs. Knights of Father Mathew (Mo.)</i>	369
Rules of fraternal association concerning expulsion are valid and binding if not so grossly unfair as to be contrary to public policy; and an appeal within the order from an expulsion may be made a condition precedent to the right to resort to the courts. To render the requirement of such an appeal operative, there must be a hearing in accordance with the laws of the order; but mere irregularities of procedure short of substantial denial of the hearing contemplated by contract of parties are remediable in first instance only as provided therein. <i>Kulberg et al. vs. National Council, Knights and Ladies of Security (Minn.)</i>	464
Power conferred on agent representing insurance company is not such that it cannot be delegated. <i>Supreme Lodge K. P. vs. Connally (Ala.)</i>	454
Where prompt payment is waived, member cannot be expelled without notice that further indulgence will cease. <i>Dougherty vs. Supreme Court of Independent Order of Foresters (Minn.)</i>	587
The courts cannot review proceedings to expel a member of benefit society or re-examine the merit of the expulsion, when conducted strictly in accordance with the laws of the order but can only determine whether member was tried according to the law of the land. Expulsion can be attacked for disqualification of the committee by which member was tried; the rule against collateral attack not applying since there was no method of direct review. Members of the Supreme Council were disqualified from sitting in trial of member because of their direct interests in the subject-matter of the controversy and where they did so sit the expulsion was void. <i>Wilcox vs. Supreme Council of Royal Arcanum (N. Y.)</i>	595
Secretary of subordinate lodge who acts for company is considered agent of company and latter will presume to have knowledge of all facts known to him. When applicant for membership conspires with local secretary and others of subordinate lodge to deceive the company, presumption of knowledge of company is overcome. Power of mutual benefit association to admit a person engaged in prohibited occupation to membership, does not exist in either the supreme officers or local lodge. Payment of premium does not validate membership, nor would it estop company from denying liability after death where local officers had knowledge of fraud practiced by him. <i>Krecek vs. Supreme Lodge of Fraternal Union of America (Neb.)</i>	590
(B) THE CONTRACT IN GENERAL	
Insured by his application and acceptance of his certificate became a member and was bound by its by-laws including one that if he should become intemperate or if his death should result directly or indirectly from the use of intoxicating liquors, certificate should be void. <i>Boeck et al. vs. Modern Woodmen of America (Iowa)</i> ..	49
Certificate of membership in benefit association not "insurable policy" within the statute and therefore not admissible in evidence unless attached to policy. <i>Marcus vs. Heralds of Liberty (Pa.)</i>	47
Warranty that assured was in good health should be construed as limited to his knowledge and belief. <i>Lakka vs. Modern Brotherhood of America (Iowa)</i>	38
Notwithstanding unfavorable report as to insured's condition association issued policy. Held, it was estopped thereafter to defend an action on the policy because of alleged untrue statements concerning insured's health. Medical examiner's knowledge of insured's previous rejection was knowledge of defendant. <i>Masonic Life Ass'n vs. Robinson (Ky.)</i>	218
The fact that agent of fraternal society was informed by other persons that insured was "too much of a drinker" etc., were mere vague opinions and not sufficient to charge the agent with the duty of investigating the extent of insured's indulgence. Where insured's misrepresentations to agent were wilful, the fact that the agent knew that insured's statements were not true would not estop company from avoiding certificate on that ground since there can be no estoppel unless one of the parties is misled to his disadvantage.	

tage. Modern Woodmen of America vs. International Trust Co. (Colo.)	228
Application for benefit certificate and by-laws of association are to be considered part of contract. Dromgold vs. Royal Neighbors of America (Ill.)	176
Association entitled to rely on certificate of good health where increase would not have been granted without such additional certificate. Knights of Maccabees of the World vs. Shields (Ky.)	217
False statements that one had never had certain diseases or undergone a surgical operation are material to the risk, within Acts 31st Leg. (1st Extra Sess.) c. 36, declaring untrue statements in an application shall not prevent recovery unless material. Supreme Ruling of Fraternal Mystic Circle vs. Hansen (Tex.)	221
In absence of statute insurance contracts are construed by same rules as other contracts. Modern Woodmen of America vs. International Trust Co. (Colo.)	223
Fraternal insurance—acceptance of contract—place of contract. Supreme Colony United Order of Pilgrim Fathers vs. Towne et al. (Conn.)	354
Fraternal insurance—domicile—statute—foreign state. Supreme Colony United Order of Pilgrim Fathers vs. Towne et al. (Conn.)	354
Evidence did not authorize a finding that agent of company who issued policy was also agent of insured so as to invalidate contract. Failure of an agent to comply with instructions of his principal which were not communicated to the insured, to attach a "rider" the effect of which would have been to cancel the policy, could not operate to the prejudice of the insured. Southern States Fire Ins. Co. vs. Tabor et al. (Ga.)	400
Cashier of branch office was authorized to bind defendant by giving out information concerning the value of policies and to represent to assignee of a policy that only \$18.40 was necessary to pay premium. Lange vs. N. Y. Life Ins. Co. (Mo.)	368
Fraternal contract to be determined by statute and laws as they exist at the beginning of membership and as they may be afterwards lawfully amended. Power accorded to society in charter to alter and repeal its constitution, by-laws, etc., enters into and forms part of contract. Reserve powers of amendment and repeal do not give the society any right to adopt a by-law which will divest, impair or disturb the rights once vested in its members. Hines vs. Modern Woodmen of America et al. (Okla.)	372
Applicant initiated but certificate not received by local officers until several days later and in the meantime applicant had been taken to hospital suffering from paresis from which he died. Held, that the rule in question not having been complied with and compliance therewith not having been waived, certificate thereof was not a binding contract. Court of Honor vs. Herling (Mich.)	366
Constitution and laws, so far as applicable to society's beneficiary contracts, form a part of the contract itself. Grand Lodge A. O. U. W. vs. Edwards et al. (Me.)	362
Denial that applicant had been treated by a physician for any constitutional disease within five years cannot be held as a matter of law a representation material to the risk assumed, where it appeared that he had only been given electric treatments for a stiff back. National Council of the Knights' and Ladies of Security vs. Sealey (Tex.)	378
Rosenstein vs. Court of Honor, 122 Minn. 310, 142 N. W. 331, followed and applied to the effect that a by-law of defendant adopted after benefit certificate was issued, and changing the limit of time for bringing an action on the certificate, is not binding upon the certificate holder or his beneficiary. Laws 1907, c. 345, § 8 (Gen. St. 1913, § 3544), does not apply to benefit certificate issued before its enactment. Ruder vs. National Council, Knights and Ladies of Security (Minn.)	462
Member having died from suicide his beneficiary could only recover amount actually paid into the mortuary fund. Pold vs. North American Union (Ill.)	457
Traveling soliciting agent—authority. Dorman vs. Connecticut Fire Ins. Co. (Okla.)	642
Contract between benefit association and its members is contained in the fundamental laws of the association and a power of amendment contemplates reasonable amendments adopted in furtherance of the contract and not such as would materially alter its terms. Benefit association. Held, that the amendments of 1912 and 1913 violated the contract rights of a member who had joined before March 1, 1910, so that he could enjoin their enforcement. Parks vs. Supreme Circle, Brotherhood of America, et al. (N. J.)	594
Rule that medical examiner shall reject a pregnant female unless she signs a waiver of claims need not be in writing or promulgated to be within its rules, subject to all of which the application is, in terms, made. Clark vs. North American Union (Mich.)	728
Amendment to by-laws exempting liability for accidents directly traceable to extra hazardous occupations included that of an electric lineman, and is valid as to one already a member. House vs. Modern Woodmen of America (Iowa)	721

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Negative answer to question, "Have you ever had a surgical operation performed or received treatment in a hospital, sanitarium, retreat, or any public or private institution for the treatment of physical or mental disease?" was not made false by proof that insured had been operated on by a physician by surgical instruments at her home. <i>Ladies of Maccabees of the World vs. Kendrick</i> (Tex.)	735
A comma will not be supplied by construction after the word "performed" in order to make false a negative answer to a question asked insured, "Have you ever had a surgical operation performed, or received treatment in a hospital . . . or any public or private institution for the treatment of physical or mental disease?" where the proof showed that insured had been operated on at her home. <i>Ladies of Maccabees of the World vs. Kendrick</i> (Tex.)	735
(C) DUES AND ASSESSMENTS.	
Anticipation of claims by assessment—notice. <i>Mulherin vs. Bankers' Life Ass'n</i> (Iowa)	558
(D) FORFEITURE OR SUSPENSION.	
(1) Statute declaring untrue statements shall not prevent recovery unless shown to be material to risk does not govern a certificate reinstated before the act took effect. <i>Supreme Ruling of Fraternal Mystic Circle vs. Hansen</i> (Tex.)	281
Prohibited occupation. Whether member personally dispenses liquors is immaterial. <i>Ostmann vs. Supreme Lodge, Knights and Ladies of Honor</i> (N. J.)	165
Mailing of notices a condition precedent to right of the association to declare forfeiture of member's rights. Parties to an insurance contract may agree that mailing of notices for contributions shall be notice to member. <i>Bange vs. Supreme Council Legion of Honor of Missouri</i> (Mo.)	206
Provision exempting company from liability for extra hazardous occupation is a reasonable and binding provision. It does not render the certificate void but exempts from liability for death due to such hazardous occupation, the certificate remaining in force and the association's liability continuing if death results from other cause. <i>Modern Woodmen of America vs. Weekley</i> (Okla.)	728
(2) Held, where member had been in arrears less than three months, the period stipulated, the widow was entitled to death benefits. <i>Roedel vs. John Hancock Mut. Life Ins. Co.</i> (Mo.)	42
Held, on the facts stated that under the by-laws, the widow was entitled to death benefits since a delay in paying dues of less than three months did not forfeit the rights of the member to continue the insurance, but only required him to carry his own insurance for the time he was delinquent. <i>Gage vs. Detting</i> (N. Y.)	48
Mailing of notices a condition precedent to right of the association to declare forfeiture of member's rights. Parties to an insurance contract may agree that mailing of notices for contributions shall be notice to member. <i>Bange vs. Supreme Council Legion of Honor of Missouri</i> (Mo.)	206
Railroad relief fund held, that since decedent never paid any assessment, recovery could not be had on his policy; the railroad company not being bound to collect such assessments from his wages. <i>Geddes vs. Ann Arbor Railroad Employees' Relief Ass'n</i> (Mich.)	365
Provision for suspension on nonpayment of dues, renders member subject to suspension, but does not on his failure to pay, ipso facto suspend him. <i>Grand Lodge, F. & A. M. of Texas vs. Dillard</i> (Tex.)	472
By-law that no person should be agent or authorized to receive money until he should have executed a bond, the same to be approved by board of control did not charge the insured with notice. <i>Supreme Lodge K. P. vs. Connelly</i> (Ala.)	454
Defendant having clearly indicated its intention to refuse further recognition of assured's membership, subsequent tender of dues and assessments was not necessary. <i>Kulberg et al. vs. National Council, Knights and Ladies of Security</i> (Minn.)	464
Where local agent of fraternal order refused to receive monthly assessment on ground that he was not a member of the order, assured was not obligated to make tenders of subsequent assessments. <i>Supreme Lodge K. P. vs. Connelly</i> (Ala.)	454
Beneficiary could not recover where member defaulted, though assessments would have been paid by beneficiary, but for belief that insured had died long prior to the time of actual death. <i>Mooney et al. vs. Supreme Council of Royal Arcanum</i> (Pa.)	729
Under statute, subordinate body cannot waive laws of constitution. Promise of local clerk to pay assessments is no defense to a suspension. Where benefit association agreed to pay dues of insane member it was not required to pay same where no proof of insanity was offered until six months after suspension for non-payment and more than three months after insured's death. <i>Sovereign Camp Woodmen of the World vs. Wagnon</i> (Tex.)	734

- (3) Unconditional receipt of dues from a member with knowledge of prohibited occupation, constitutes waiver of forfeiture. Ostmann vs. Supreme Lodge, Knights and Ladies of Honor (N. J.) 168
- Restrictions upon power of insurance agent to waive any of the conditions of the contract or upon the method of such waiver are themselves conditions of the contract which may be waived the same as any other condition. Conduct on part of association amounting to a recognition of a member's claim to continuing rights of membership will relieve him of consequences of his default and an acceptance of an assessment without condition waives all the previous known grounds of forfeiture. Recorder of local camp with full knowledge of cause of suspension accepted his assessments and remitted to association and treated insurance as in force which was a waiver of the cause of suspension. Dromgold vs. Royal Neighbors of America (Ill.) 174
- Waiver of forfeiture for nonpayment of dues by acceptance of premium is not based on contract or actual intention but on estoppel to insist on actual conditions inconsistent with acceptance or rejection of the premium. Forfeiture of benefit certificate once waived cannot afterwards be revived. As between the association and a beneficiary, the rule that actual knowledge of cause of forfeiture must be shown to work a waiver will not be applied if it should have known of the facts by proper attention to its business. Waiver of forfeiture of benefit certificate may be inferred. Acts of an association in not properly declaring a forfeiture could be considered in determining whether it had knowledge of her illness while retaining premiums prior to death as well as on a question of waiver of forfeiture after death. Forfeiture is waived where association with knowledge of cause of forfeiture causes plaintiff to incur additional expense in furnishing proof, that being an implied recognition of the continued validity of certificate. Though association did not know its agent had accepted back premiums it ratified the agent's act by retaining them after learning that insured was in bad health. Keyes et al. vs. National Council, Knights & Ladies of Security (Mo.) 200
- Waiver of forfeiture for nonpayment left payment thereof still optional. Mulherin vs. Bankers' Life Ass'n (Iowa) 383
- If insured in employees' mutual benefit association actually knew that his premiums had not been paid from the fact that he had drawn his full wages each month and had not otherwise paid them, it was not necessary that he be given notice by the association of that fact even if the policy required such notice. Geddes vs. Ann Arbor Railroad Employees' Relief Ass'n (Mich.) 385
- Local clerk of benefit society is not only agent but is chargeable with duty of ascertaining whether certificate ought to be delivered and take effect, and his knowledge is imputable to the society. Peebles vs. Eminent Household of Columbian Woodmen (Ark.) 576
- If benefit society creates belief that strict compliance will not be required, it will be held to have waived the requirement. If the conduct of the subordinate agency which as sole agency is such as to operate as a waiver, such waiver is binding upon the superior body. Dougherty vs. Supreme Court of Independent Order of Foresters (Minn.) 587
- Doctrine of waiver of forfeiture has no application where society's president advised beneficiary that claim was rejected or that he had a right of appeal to its executive committee which would meet at a certain place, on a certain date, though on his going there no one appeared. Clark vs. North American Union (Mich.) 723
- Where, after the issuance of certificate, the member enters upon hazardous occupation, and death results due to such occupation, society is not estopped from denying liability for having accepted member's dues and assessments, up to the time of death. Local agent who has authority to solicit, execute and deliver policies, has no such power. Modern Woodmen of America vs. Weekley (Okla.) 728
- (4) Held, that the provision rendering void the relief fund certificate for engaging in the prohibited occupation is self-executing. Ostmann vs. Supreme Lodge, Knights and Ladies of Honor (N. J.) 168
- Where by-laws of benefit association vested a discretion in council whether to assume the burden of paying contributions for member and it was the custom to defer action thereon to the next meeting, the provisions for forfeiture of member's rights for non-payment of contributions are not self-executing and the suspension, if made, is necessarily deferred, even though notice is given, until action of council is had and member declared suspended. For notice of suspension to conclude a forfeiture notice must be an official one. Question of the regular address of member is not identical with that of domicile, which depends on intention; the expression "regular address", merely referring to the place where member would be likely to get his mail. Acquiescence of member in suspension binds beneficiary though suspension was not legal and it need not appear that member had official notice of

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suspension. <i>Bange vs. Supreme Council, Legion of Honor of Missouri</i> (Mo.)	208
Society need not tender return of premiums in order to forfeit certificate on the ground of wilful misrepresentations, though assessments must be returned on forfeiture in case of nonintentional breach of warranty. <i>Modern Woodmen of America vs. International Trust Co.</i> (Colo.)	236
Member of an order having to his knowledge been dropped for non-payment of dues and assessments by proceedings regularly taken and not having made application for reinstatement must be deemed to have acquiesced in the dropping of him. <i>Roberts vs. Brotherhood of Locomotive Firemen and Enginemen</i> (Ky.)	218
Where by-law provides for suspension on nonpayment of dues and that during such suspension certificate shall be absolutely void and member dies during suspension, his beneficiaries have no interest in certificate, although another by-law permitted of reinstatement by payment of dues within sixty days, which permit had not expired at time of member's death. <i>Tabor et al. vs. Modern Woodmen of America</i> (Tex.)	474
(B) Reinstatement was on a warranty that he had had none of those diseases as warranted in the original application, after the certificate was issued and before reinstatement. In the absence of a statute limiting the effect of a breach of warranty, on which one is reinstated to membership, that he has not had certain diseases, the breach works a forfeiture of the contract. Supreme Ruling of Fraternal Mystic Circle vs. Hansen (Tex.)	221
Held, that, since insured died before the expiration of fifteen days after payment of the overdue premiums, the policy had lapsed at insured's death, barring recovery. <i>Royal Benefit Society vs. Naylor</i> (Ga.)	357
Held, that even though the dues did not fall in arrears until the end of the month, member at the time of payment was in arrears. <i>McGillion vs. United Brotherhood of Carpenters & Joiners of America</i> (N. H.)	371
Where assessment was levied on November 17, 1910, and member had until the last day of December to pay, failure to pay on last day forfeited certificate and beneficiaries were not, after the decedent's death, allowed sixty days, given to member. <i>Tabor et al. vs. Modern Woodmen of America</i> (Tex.)	474
In absence of provision, it is not necessary that insured be in good health in order to be reinstated. <i>Mutual Life Ins. Ass'n of Donley County vs. Rhoderick</i> (Tex.)	733
Tender of payment not accompanied by certificate of good health does not entitle member to reinstatement. <i>Sovereign Camp Woodmen of the World vs. Wagnon</i> (Tex.)	784
(B) BENEFICIARIES AND BENEFITS.	
(1) Public policy does not prevent one from making insurance on his own life payable to another who has no insurable interest on it. Unless restrained by statute, or by character or by-laws, assessment company can bind itself to pay amount of policy to beneficiaries named therein though they have no insurable interest. <i>Barnett et al. vs. United Brothers of Friendship</i> (Ala.)	580
(2) In an action by former wife against insured's heirs to recover proceeds of fraternal beneficiary policy, held, plaintiff not entitled to payment of certificate unless she was dependent upon member at time of death; the burden of proof rests upon her. If it were shown that by his death the former wife could not recover on a judgment rendered previous to his decease, she would be regarded as dependent upon him. The fact alone that such judgment had been satisfied would not make her dependent upon him if his death did not prevent the collection of her judgment. <i>Johnson vs. Grand Lodge A. O. U. W. of Kansas et al.</i> (Kan.)	488
"Benefit certificate" defined. Statute construed. Where member designated his father and mother as beneficiaries and certificate was payable by its terms to them, they were entitled to the benefit, though the member left a wife and child constituting his "family." <i>Green et al. vs. Grand United Order of Odd Fellows et al.</i> (Tex.)	600
Acts 26th Leg., c. 115, § 1. does not deny to the member the right to designate a beneficiary within the rules mentioned. <i>Green et al. vs. Grand United Order of Odd Fellows et al.</i> (Tex.)	601
(3) It being inferable from the allegations of the petition that the insurer, with full knowledge of all the facts, has waived or may waive the beneficiary's disability, if any exists, the disability or disqualification of the beneficiary affords the plaintiffs no ground to recover upon the allegation that they are the sole heirs-at-law of the deceased. <i>Johnson et al. vs. Knights of Pythias of North and South America</i> (Ga.)	214
Under the general law, a letter from a member to his son expressing his intent and purpose that at his death the son should have the benefit did not constitute a "legal designation." <i>Grand Lodge A. O. U. W. vs. Edwards et al.</i> (Me.)	362

Statute—vested interest. Supreme Colony United Order of Pilgrim Fathers vs. Towne et al. (Conn.)	354
Under the general law, the surviving widow of a member, whose first wife, the beneficiary named therein had died leaving one child, in the absence of any legal designation of any other beneficiary, was entitled to the benefits. Grand Lodge A. O. U. W. vs. Edwards et al. (Me.)	361
Where a member designated wife as beneficiary and she died before him and he made no designation, fund will be directed to be paid to member's half-brother instead of his wife's administratrix; it appearing that neither wife's administrator nor the husband's administrator was entitled. Supreme Colony United Order of Pilgrim Fathers vs. Towne et al. (Conn.)	364
Where by-laws made no provision for payment of benefit to member's estate, if no beneficiary was designated, a member's estate takes no interest in the fund by reason of his failure to exercise his power of appointment, for such power is not an asset in his hands. Supreme Colony United Order of Pilgrim Fathers vs. Towne et al. (Conn.)	364
Change in the by-laws whereby on death of beneficiary and failure of the member to make a new designation, his wife at time of his death should take in preference to his heirs. Hines vs. Modern Woodmen of America et al. (Okla.)	372
In the absence of statutory provision where father and mother of a member of benefit society were designated as beneficiaries, subsequent marriage did not change beneficiary. Green et al. vs. Grand United Order of Odd Fellows et al. (Tex.)	600
While creditor has an insurable interest in debtor's life, he is not merely by reason of that relationship, a dependent. Finch vs. Bond et al. (Ky.)	722
Woman who contracted bigamous and void marriage with knowledge that member had living wife was not "dependent" upon him. Duenser vs. Supreme Council of Royal Arcanum (Ill.)	719
(4) Member has right to change beneficiary, after designation, hence beneficiary on designation acquires during life of member, merely an expectancy revocable at member's pleasure. Supreme Colony United Order of Pilgrim Fathers vs. Towne et al. (Conn.)	254
Beneficiary in certificate only acquires a vested right in the benefits accruing on member's death. Hines vs. Modern Woodmen of America et al. (Okla.)	372
Beneficiary in benefit certificate acquires no vested interest until death of assured and his expectant interest may be defeated at any time prior thereto by proper substitution of another in his stead. Hughes vs. Modern Woodmen of America (Minn.)	465
If assured has done all the things required of him to make a change in beneficiary, his death before the issuance of new certificate required by the by-laws will not defeat such change in the absence of an express provision specifying when change will take effect. Request for change was not received until after death of member. Proposed change did not become effective. Tierney vs. Modern Woodmen of America (Minn.)	465
If assured has done all the things required of him to make a change in beneficiary, his death before the issuance of new certificate required by the by-laws will not defeat such change in the absence of an express provision specifying when change will take effect. Request for change was not received until after death of member. Proposed change did not become effective. Hughes vs. Modern Woodmen of America (Minn.)	466
Rights of beneficiary are subject to right of insured to change beneficiary in manner prescribed. Modern Brotherhood of America vs. Matkovitch et al. (Ind.)	720
While insured can change beneficiary, it must be done in mode prescribed, yet equity will aid imperfect changes. Where insured was prevented from making change by wrongful withholding of certificate by beneficiary, equity will regard change as made. Modern Brotherhood of America vs. Matkovitch et al. (Ind.)	720
(5) An insurance policy which contains no stipulation as to suicide is not avoided as to beneficiary, the insured's wife, where insured commits suicide. Marcus vs. Heralds of Liberty (Pa.)	47
A certificate or policy may provide there shall be no liability if the insured died within a year from certain diseases. Red Men's Fraternal Accident Ass'n of America vs. Rippey (Ind.)	215
Whether insured, when killed in an altercation was not the "offending party," depended on an affirmative finding that he brought on the difficulty. Knights of Maccabees of the World vs. Shields (Ky.)	217
Under the general powers, mutual benefit association had power to insert clause for forfeiture of benefits in case of suicide by member; under statute association had such power whether member was sane or insane. Pold vs. North American Union (Ill.)	457
"Suicide" as used in benefit certificate, implies a mental appreciation of act of self-killing, which an insane person could not have. Benard et al. vs. Protected Home Circle (N. Y.)	569
Clause exempting from liability for death from suicide would not be applicable if assured took poison through mistake. Benard et al. vs. Protected Home Circle (N. Y.)	569

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The laws and practices of a benefit society in ascertaining the amount of death benefits, prevailing during the membership of a decedent, and which were an integral part of its contract with him, should be followed in computing amount due, notwithstanding an existing by-law. <i>Hatcher vs. National Annuity Ass'n of Kansas City (Mo.)</i>	589
Insurer is liable where injury caused visible marks on body even though later obliterated. The term "visible" being used in the broad sense of perceptible, discernible, clear, distinct and evident. <i>Mutual Trust & Deposit Co. vs. Travelers' Protective Ass'n of America (Ind.)</i>	827
(6) Provision in policy as to method of proof of death is merely a declaration of course to be followed under ordinary circumstances. That beneficiary was not able to make such proofs due to disappearance of insured did not bar right to recovery. <i>Mannheimer vs. Independent Order of Ahawas Israel (N. Y.)</i>	885
Where fraternal order refused to pay loss under certificate on the grounds of forfeiture and failure to make proofs of loss, pleading of invalidity of certificate constituted a waiver of necessity of furnishing proofs of loss. Where mutual benefit association defended suit on grounds of lack of proofs of loss and, after plaintiff had taken a voluntary nonsuit, furnished plaintiff with blanks on which were made proofs of loss, such action constituted a waiver. <i>Walker vs. Supreme Knights of Maccabees (Mo.)</i>	489
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Under the general law, the surviving widow of a member, whose first wife, the beneficiary named therein had died leaving one child, in the absence of any legal designation of any other beneficiary, was entitled to the benefits. <i>Grand Lodge A. O. U. W. vs. Edwards et al. (Me.)</i>	362
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(8) Divorce—change of beneficiary. Held, on the facts stated: First that the association was not a necessary party to the action. Second, that the petition stated the cause of action against sisters of insured. Third, that the limitation in the certificate has no application to the action brought by the children to recover the fund from the sisters of the deceased members, who had gained possession of it through fraud. <i>Munroe et al. vs. Beggs et al. (Kan.)</i>	583
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